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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1238

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO, and UNION DE TRABAJADORES DE MUELLES Y RAMAS ANEXAS, LOCAL 1740, ILA-AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

—and—

MARINE & MARKETING INTERNATIONAL CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

International Organization of Masters, Mates and Pilots, International Marine Division, ILA, AFL-CIO, and Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, ILA-AFL-CIO, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 15, 1973 (*infra,* p. 1a).

OPINIONS BELOW

The opinion of the Court of Appeals, Judge David L. Bazelon dissenting, is reported at 486 F.2d 1271 (*infra*, pp. 3a-17a). The opinion of the National Labor Relations Board is reported at 197 NLRB No. 69 (*infra*, pp. 18a-42a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1973 (*infra*, p. 1a). A petition for rehearing was denied on December 3, 1973 (*infra*, p. 2a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

From the time that the ship was originally launched, throughout the nine years of its operation, its master and three mates had been members of and represented by MMP, a maritime union. After a change in the ship's operator, the new operator refused to employ the MMP master and mates, but instead hired a master and mates who were members of and represented by another maritime union, MEBA. The new operator shifted from MMP to MEBA officers, not because of any dissatisfaction with the performance of MMP officers, but because MEBA agreed with it to a financial arrangement which reduced the new operator's labor costs by about $100,000. The question presented is whether MMP, a union composed primarily of maritime supervisors but with a number of nonsupervisory employees among its members, is prohibited by section 8(b)(1)(B) of the National Labor Relations Act from peacefully picketing the ship for the purpose of persuading the new operator to restore the lost jobs

to the MMP officers, the picketing being unrelated in any way to the performance of any grievance adjustment functions by either MMP or MEBA officers.

STATUTE INVOLVED

Section 8(b)(1)(B) of the National Labor Relations Act (29 U.S.C. § 151) provides that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances . . . ." Section 2(3) of the Act provides in part that the "term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor," and section 2(5) of the Act provides in part that the "term 'labor organization' means any organization . . . in which employees participate . . . ." Section 14(a) of the Act provides that: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

STATEMENT

I. The Facts.

The M/V *Floridian*, a container type cargo vessel, is part of the American merchant marine (J.A. 14; 61, 3, 10). Owned by Containerships, Inc. (J.A. 14; 108-109), the vessel was until November 1970 operated for nine years by South Atlantic & Caribbean Line (SACAL) under lease from Containerships, car-

rying cargo between Miami, Florida, and San Juan, Puerto Rico (J.A. 14-15; 97). In November 1970 SACAL went bankrupt; the *Floridian* was decommissioned; and it was placed in dry dock at Norfolk, Virginia (J.A. 15; 58).

From the time it was originally launched, during the entire preceding nine-year period of its operation, the *Floridian's* crew was represented in collective bargaining by three separate labor organizations: the ship's master and three mates by petitioner International Organization of Masters, Mates and Pilots (MMP); the engineering officers by Marine Engineers Beneficial Association, District 2 (MEBA); and the unlicensed personnel by Seafarers International Union (SIU) (J.A. 14-15 and n. 2; 98, 111-112, 193).

Formed in March 1971, Marine & Marketing International Corporation (M&M) was organized to succeed SACAL as the operator of the *Floridian,* again plying the Miami-San Juan run (J.A. 13, 15; 57-58, 103, 107, 109). One Eduardo Garcia was M&M's actual head; he conceived its formation in late December 1970, determined its policy, and operated it (J.A. 15 and n. 3; 57, 103-104, 106-107).

Captain William Travers had been the *Floridian's* master before it was laid up (J.A. 17; 97). Having "had the highest reports about his professional ability and conduct" and having heard "everybody" speak "highly of him" (J.A. 97), Garcia met with Captain Travers in late February or early March 1971 (J.A. 97-98). They discussed the operation, capacity, schedule and condition of the *Floridian,* and at the conclusion of the conversation Garcia offered Captain Travers the command of the vessel (J.A. 98). Captain

Travers asked Garcia whether he was "going to operate the ship" with the MMP, and Garcia replied "No" (J.A. 99). By this time Garcia already "had ruled . . . out" MMP and instead "was contemplating" contracting with MEBA as the representative of the master and mates (J.A. 100, 107-108). Captain Travers declined joining the ship under the union aegis of MEBA, having had MMP membership for 18 years with but "two years to go on his pension" with MMP (J.A. 99). But for his lack of MEBA membership, Garcia would have been "[v]ery delighted" to have Captain Travers as master of the *Floridian* (J.A. 115).

Garcia contacted MEBA in March or April 1971 (J.A. 110). Agreement was reached on a manning scale more favorable to M&M than had prevailed when the *Floridian* had been operated by SACAL (J.A. 111). While retaining a master and three mates as before (J.A. 130), MEBA agreed to reduce the licensed engineers by one and SIU agreed to reduce the unlicensed seamen by three (J.A. 111-112, 102, *infra,* p. 4a). The reduction in crew size by four men resulted in a saving of $100,000 (J.A. 102, 212). According to M&M, MMP "has outpriced itself in the maritime market . . . . [Given] the prevailing MM&P wage structure and manning scales . . . [, its] contract, together with changes necessitated by that contract would have cost . . . [M&M] more than $100,000 additional labor costs . . ." (J.A. 211-212). Accordingly, although MEBA had formerly represented only the licensed engineers, on June 15, 1971 M&M entered into a three-year agreement with MEBA covering the master and mates as well as the licensed engineers (J.A. 15-16; 59, 89-90, 112, 142, 205-208). As before, the unlicensed personnel continued to be represented by SIU (J.A. 125; 133, 142, 216).

In late June 1971, subsequent to entry into the agreement with MEBA, Garcia hired Captain Donald Mappin as master of the *Floridian,* selecting him after a telephone interview only from among a number of candidates presented by MEBA (J.A. 16; 90, 94-95, 116, 133). Captain Mappin reported to the ship about July 10, 1971 while it was still in dry dock at Norfolk (J.A. 16; 94). He chose the chief mate, and the second and third mates were referred to the vessel by MEBA from its shipping list (J.A. 16; 138). Captain Mappin and the three mates are all MEBA members (J.A. 125). Under the MEBA agreement none but MEBA members can be selected as master or mates (J.A. 115-116).

From the inception of his plan to form M&M to take over the operation of the *Floridian,* Garcia knew that the ship had been formerly manned by masters and mates represented by MMP (J.A. 96, 98-100, 107-108, 109-110).

On July 13, 1971, an MMP representative boarded the *Floridian,* and asked Garcia "when he was going to order the officers for the vessel" (J.A. 16; 68). Garcia replied that he "had a captain already, that officers would shortly follow, and that . . . [he] was not ordering any other officers" (J.A. 16; 69). The MMP representative stated that the MMP "had been running that vessel since she was built and that they had very experienced members and . . . the best people in the trade" (J.A. 69); it "had been an . . . [MMP] ship and . . . he wanted . . . [MMP] people back in the deck department . . ." (J.A. 132). Garcia rejoined that he "already [had] a contract with another organization," to which the MMP representative responded that he was "making a big mistake" and

"some serious consequences" could ensue from his action (J.A. 16-17; 69, 132).

About ten days later the same MMP representative telephoned Garcia, again asking him when he "was . . . going to order the officers for the *Floridian*"; Garcia again demurred; but a meeting was arranged for Garcia to discuss the question with the president of the MMP (J.A. 17; 69). The two met in New York City that day or the next and discussed the master and mates to man the *Floridian* (J.A. 17; 70). The MMP president stated that " 'by tradition those jobs belong to us' "; that the "jobs aboard the vessel had always been supplied by his organization"; and that "he had excellent and experienced people to crew the vessel . . ." (J.A. 17; 70). Garcia replied that he "had a contract" with MEBA "and could not possibly change now . . ." (J.A. 17; 70). The MMP president warned Garcia "that they were going to stop the ship . . ." (J.A. 17; 71).

Manned by MEBA officers, the *Floridian* sailed from Norfolk and arrived at Miami at about 6:00 p.m. on July 30, 1971, to load its first cargo (J.A. 17; 71). As the ship docked, it was picketed by Captain William Travers, two of his mates, and a fourth officer; all were MMP members and Captain Travers and his two mates were the most recent officers aboard the *Floridian* when it had been operated by SACAL (J.A. 17; 72-73). The picket signs read "MV Floridian Unfair" to the named officer carrying the sign, further identifying him as a "Former" officer of the vessel and an MMP member (J.A. 17 and n. 7; 72-73, 190). The longshoremen observed the picket line (J.A. 17-18; 74, 77, 118-119). Within hours the Company obtained a state court temporary restraining order; the

picketing ceased; the ship was loaded; and it sailed the next day at 3:00 p.m. for San Juan, arriving there on August 3, 1971 (J.A. 18; 77, 119, 147).

After the *Floridian* docked at San Juan, the same four MMP officers who had picketed the vessel at Miami began to picket it at San Juan, two patrolling the ship where it was berthed at the pier within the terminal, and two patrolling at the gate of the terminal leading to the pier (J.A. 18; 77-78, 148-149, 154, 186-187). As a result of police intervention, all picketing was removed to the gate outside the terminal (J.A. 18; 149-151, 158, 185). The picket signs were essentially the same as those borne at Miami, except that the signs in English were supplemented by identical signs in Spanish, and except that wording was later added in English and Spanish stating that "There is no dispute with any other vessel" (J.A. 18, 19, n. 11; 78, 182-184). As an MMP representative explained, "We picketed the *Floridian* to get back the jobs that belong to the . . . [MMP] members, and that is our only reason" (J.A. 194). This representative informed Garcia during the San Juan picketing that "Basically, what we . . . [are] asking . . . [you] to do . . . [is] to replace the people that . . . [you] had displaced on the vessel—namely, the four officers—since they were . . . [MMP] members—restore them to their regular jobs" (J.A. 180). Garcia replied that "he could not . . . without permission from MEBA and the SIU in New York . . ." (J.A. 180). And so the *Floridian* was picketed by MMP because "they do not have our people on board and they will not have them on board" (J.A. 195).

The picketing continued for about six weeks (J.A. 19; 88). The longshoremen observed the picket line,

declining to unload the *Floridian,* but continuing to work other vessels berthed nearby (J.A. 19; 152-153, 155, 163-164). In mid-September 1971 a temporary restraining order was issued; the picketing ceased pursuant to that order; the longshoremen unloaded the *Floridian;* and the ship sailed from San Juan on September 17, 1971 (J.A. 19; 88, 120, 164-165).

The *Floridian's* master and mates "adjust grievances among crew members" (J.A. 20-21),[1] but this is "[a]n extremely insignificant part" of an officer's functions, both in time and importance (J.A. 197). As to Captain Travers, the *Floridian's* former master, no one had complained to Garcia about Captain Travers' performance in adjusting grievances (J.A. 113); on the contrary, Garcia would have been "[v]ery delighted" to have Captain Travers as master of the *Floridian* (*supra,* p. 5). In no conversation that Garcia had with any MMP representative did he ever discuss the grievance adjustment performance of either MMP or MEBA personnel (J.A. 115). No résumé of a master contains anything pertaining to grievance adjustment (J.A. 117-118). In selecting Captain Mappin as master of the *Floridian,* Garcia did not ask either Captain Mappin or his former employer as to his grievance adjustment performance (J.A. 118, 134). In general no inquiry is ever made of a master concerning his experience, ability or performance in grievance adjustment in considering whether to hire him (J.A. 172). To the knowledge of an informed mariner (J.A. 169-170), no master or mate has been discharged or

[1] The master does not—and necessarily the mates do not—participate in negotiating a collective bargaining agreement (J.A. 172, 192); "That is outside the province of the master" (J.A. 172).

reprimanded for any default in grievance settlement (J.A. 173, 189), and no statute or Coast Guard regulation "casts upon a captain the duty or responsibility for settlement of grievances" (J.A. 187, see also, J.A. 93). Finally, neither the MMP nor MEBA agreement covering deck officers mentions grievance adjustment in detailing the duties and responsibilities of the master and mates (J.A. 90-92, 205-208, 177-178, res. ex. 7, p. 5).

The MMP neither represents nor seeks to represent the licensed engineers or the unlicensed crew aboard the *Floridian*, confining itself strictly to its traditional AFL-CIO jurisdiction as the representative of masters, mates and pilots (J.A. 181).

II. The Decision of the National Labor Relations Board.

The Administrative Law Judge found that "[i]t is undisputed that from the outset Garcia decided to deal with MEBA with the intent of staffing the ship with officers who belonged to that labor organization, rather than to deal with MMP and hire MMP officers; it is further undisputed that this decision was motivated by Garcia's feeling that it would be economically more advantageous for the Company to deal with MEBA than with MMP" (J.A. 15-16, *infra*, p. 21a). He nevertheless concluded that, in resisting the displacement of the MMP officers by strangers to the vessel and in seeking to regain for them the positions they had formerly occupied on it, MMP violated section 8(b)(1)(B) of the National Labor Relations Act (J.A. 20-24, *infra*, pp. 25a-29a).

The Administrative Law Judge reached his conclusion by a swift syllogism. Section 8(b)(1)(B) of the Act makes it "an unfair labor practice for a labor

organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . ." MMP is a labor organization since its membership is not confined to supervisory personnel only (J.A. 14, *infra*, p. 20a);[2] the master and mates "adjust grievances among the crew members" (J.A. 20, *infra*, p. 26a); "picketing constitutes restraint and coercion . . ." (J.A. 21, *infra*, p. 27a); *ergo*, as "the object of the picketing was to require the Company to replace" MEBA officers with MMP officers, MMP violated section 8(b)(1)(B) because it exercised "coercion (picketing) to require the Company to change its selection of individuals whose duties include the adjustments of employee grievances" (J.A. 22, *infra*, p. 27a).

To the MMP's protest that this reading of section 8(b)(1)(B) is wholly alien to its purpose, the Administrative Law Judge responded that it suffices that MMP's conduct "is literally and directly encompassed within the language" of that section (J.A. 24, n. 16, *infra*, p. 29a, n. 16). To the MMP's complaint that its "objective to regain jobs that its members previ-

[2] The complaint alleged (J.A. 3), the answer did not deny (J.A. 10), and the Administrative Law Judge therefore found that MMP was a labor organization within the meaning of section 2(5) of the Act (J.A. 14 and n. 1, *infra*, p. 20a and n.1). Section 2(5) defines a labor organization as "any organization . . . in which *employees* participate. . . ." While section 2(3) of the Act excludes from the term "employee" "any individual employed as a supervisor," and while the MMP is primarily composed of maritime supervisors, it does include a number of statutory employees within its membership, and is therefore a labor organization within the meaning of the Act. *International Organization of Masters, Mates and Pilots of America* v. *N.L.R.B.*, 351 F.2d 771 (C.A. D.C., 1965).

ously held aboard the same vessel was a legitimate union goal," the Administrative Law Judge responded that "'a labor organization is clearly not free to utilize any means it chooses in order to achieve a desired result'", without any explanation as to his reasons for concluding that the statute faulted the means employed (J.A. 22-23, *infra*, p. 28a). To the MMP's objection that it could not have violated section 8(b)(1)(B) because its "conduct 'did not stem from any grievance adjusting activity on the part of the Floridian's officers'", the Administrative Law Judge responded that the "short answer to this is that the Board has considered and rejected a similar contention," citing two earlier companion decisions of the Board (J.A. 23, *infra*, pp. 28a-29a, and n. 15). As read by the Administrative Law Judge, these two decisions stand for the proposition that, so long as an individual is empowered to adjust grievances, it is irrelevant to the reach of section 8(b)(1)(B) that a union's objection to the employment of that individual is unrelated to his "collective-bargaining or grievance-adjustment functions" and has nothing to do with "the performance of statutorily protected functions" (J.A. 23, n. 15, *infra*, p. 29a, n. 15).

The two NLRB decisions upon which the Administrative Law Judge relied are *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134 (Illinois Bell Telephone Co.)*, 192 NLRB 85 (1971), and *Local Union No. 2150, International Brotherhood of Electrical Workers, AFL-CIO (Wisconsin Electric Power Co.)*, 192 NLRB 77 (1971). The District of Columbia Circuit denied enforcement of the Board's order in the *Illinois Bell* case (*International Brotherhood of Electrical Workers, AFL-CIO and Local 134*

v. *N.L.R.B.*, 83 LRRM 2582 (C.A.D.C., 1973)), while the Seventh Circuit granted enforcement of the Board's order in the *Wisconsin Electric case* (*N.L.R.B.* v. *Local 1250, International Brotherhood of Electrical Workers, AFL-CIO*, 486 F.2d 602 (C.A. 7, 1973)). On January 21, 1974, this Court granted certiorari to review the judgment of the District of Columbia Circuit in *Illinois Bell. N.L.R.B.* v. *International Brotherhood of Electrical Workers, AFL-CIO*, October Term 1973, No. 73-795, 42 USLW 3416.

The Administrative Law Judge concluded that "the conduct of . . . MMP in picketing the vessel M/V 'Floridian' . . . restrained and coerced the Company in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances, and . . . MMP thereby violated Section 8(b)(1)(B) of the Act" (J.A. 23-24, *infra*, p. 29a). He *inter alia* ordered the MMP to cease "[p]icketing the vessel M/V 'Floridian' to procure the removal of . . . [M&M] of its representatives for the purpose of collective bargaining or the adjustment of grievances" (J.A. 29, *infra*, pp. 34a-35a). The Board adopted his decision and order without comment (J.A. 50-51, *infra*, pp. 41a-42a).[3]

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[3] The Administrative Law Judge also found, and the Board agreed, that petitioner Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, ILA-AFL-CIO, instructed the longshoremen to observe the picketing of the *Floridian* at San Juan, and thereby "acted in concert with . . . MMP . . . in violation of Section 8(b)(1)(B) of the Act" (J.A. 27, 50-51, *infra*, pp. 32a-33a, 41a-42a). The validity of the conclusion adverse to Local 1740 is dependent on the validity of the conclusion adverse to MMP, and the two therefore join in this petition to contest the interpretation of Section 8(b)(1)(B). However, the petition does not bring into issue the subsidiary conclusion that Local 1740 instructed the longshoremen to observe the San Juan picket line.

III. The Decision of the Court of Appeals.

A divided Court of Appeals, Judge David L. Bazelon dissenting, affirmed the decision of the Board.

The majority agreed that, in manning the *Floridian* with MEBA rather than MMP officers, the employer's reason for the change was "not any dissatisfaction with the performance of the former MM&P deck officers," but rested rather on the fact that the "new arrangement was financially beneficial to the company" in that "the shift to MEBA . . . evidently saved the company about $100,000 per year" (*infra*, p. 4a). It nevertheless concluded that MMP was barred from picketing to regain the lost jobs because its "actions come within the literal purview of the statutory language" (*infra*, p. 6a).

The majority acknowledged that "Congress intended to permit supervisors to resort to self-help" (*infra*, p. 6a), and that the legislative history of section 8(b)(1)(B) discloses "some evidence that Congress' primary concern was with situations falling" outside of the bounds of the instant activity (*infra*, p. 9a), but it was unpersuaded that it should go beyond "the statute's literal scope" (*infra*, p. 9a). It doubted that Congress "intended" a "*post hoc* inquiry into the employer's motives;" it refused to rest "the legality of MM&P's picketing on an open-ended inquiry into the company's 'real purpose' in choosing MEBA over MM&P;" its controlling concern was that the "company has an interest in being free from coercion in the selection of its grievance adjusters, no matter what its reasons for choosing one union over the other" (*infra*, pp. 9a-10a).

In the majority's view the solution available to MMP is to strip its membership of all statutory employees; it becomes by that action a simon-pure supervisory union outside the statutory scope of a labor organization to which the Act's prohibitions alone apply; and thereby it frees itself to "commit an unfair labor practice under any of the subsections of Section 8(b), including Section 8(b)(1)(B)" (*infra,* pp. 6a-7a). It granted that "this interpretation of the Act produces a rather arbitrary result, since the participation of 'employees' in MM&P has no real relevance to the present case" (*infra,* p. 7a), but it saw no feasible alternative to this construction (*infra,* p. 11a).

In dissent, Judge Bazelon protested that the majority's verbal logic "led into a *cul de sac*" by which the proper scope of section 8(b)(1)(B) is to be "deduced from the statutory language alone" *infra,* p. 13a). Thus, while the Act "left [supervisors] 'to seek redress in self-help' for their economic and organizational grievances," and did not limit the type of unions to which they might belong, the majority's interpretation curtails their resort to self-help by restricting them to action through simon-pure supervisory unions only (*infra,* pp. 14a-15a). Furthermore, while the maximum reach of section 8(b)(1)(B) extends no further than "employee union attempts, by discipline or otherwise, to force its supervisor members to perform collective bargaining or grievance adjustment functions in a manner favorable to the union" (*infra,* p. 15a), the majority's interpretation prohibits self-help in an area wholly outside the mischief at which the section is aimed. Additionally, while peaceful picketing enjoys special statutory and constitutional so-

licitude and is not to be barred absent the clearest showing that its interdiction is intended, the majority's interpretation nevertheless bans peaceful picketing even though the legislative history of section 8(b)(1)(B) "quite simply lacks any indication that it was intended to prohibit supervisors from peaceful picketing in protest of their employer's actions, at least when their protest does not even arguably favor the interests of their employer's rank-and-file employees" (*infra*, p. 16a). Accordingly, Judge Bazelon concluded, a balanced approach to the reach of section 8(b)(1)(B), meshing the entirety of the pertinent considerations, "favors a more narrowly drawn, more rational rule," one which does not trench on self-help to protect the employment interests of supervisors in circumstances devoid of incursion into the supervisor's performance of his grievance adjustment functions (*infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

I

On January 21, 1974, this Court granted the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers, AFL-CIO*, October Term 1973, No. 73-795, 42 USLW 3416, to review the judgment of the Court of Appeals for the District of Columbia Circuit in two consolidated cases.[4] As in *Electrical Workers*, so here, at issue is the meaning of the section 8(b)(1)(B) of the National Labor Relations Act, and the rela-

[4] A companion petition of the charging party in one of the two cases was also granted on the same day. *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, et al.*, October Term 1973, No. 73-556. 42 USLW 3416.

tionship of the exclusion of supervisors from the protection of the Act in ascertaining that meaning. Indeed, one of the two cases embraced by the granted petition in *Electrical Workers* is the very case (issued simultaneously with a companion case) upon which the Board relied to furnish the premise for its decision here (*supra,* pp. 12-13).

In *Electrical Workers,* the Board in its petition stated that the question presented was "[w]hether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining members who are supervisors for crossing a picket line and performing rank-and-file work during an economic strike against the employer" (p. 2). The essence of the Board's position is that the amenability of a member-supervisor to union discipline for performing rank-and-file work during a strike may have a general tendency to supinate the supervisor to the union's will in all matters and may therefore indirectly detract from his full effectiveness in representing his employer's interest in future grievance adjustment vis-a-vis his subordinate employees. As the Board sees it, adhesion to the union to promote strike solidarity supposedly undermines adhesion to the employer in grievance adjustment after industrial peace is restored. However farfetched it is, this speculation concerning the tractability with which the supervisor may be imbued—a view which reduces faith in a person's forthrightness and integrity in doing a job to the vanishing point—relates at least marginally to the protective function of section 8(b)(1)(B). For, even if tenuously, it looks to whether the union's conduct may impair the representation of the employer in grievance adjustment.

In the present case, however, the Board's interpretation of section 8(b)(1)(B) is not even arguably within the zone of that section's protective interest. The employer chose MEBA officers over MMP officers, not because of any concern over the grievance adjustment performance of either group, but solely to effectuate a saving in labor cost. MMP resisted the employer's choice and peacefully picketed to protest it, not for any reason which pertained to grievance adjustment by either the MMP or MEBA officers, but exclusively to recover the lost jobs for the MMP officers. Grievance adjustment was not a factor which entered into the employer's action or MMP's reaction. It was a neutral and indifferent element not relevant to the conduct of any. Indeed, since the MMP does not represent, and does not aspire to represent, any but the master and mates aboard the vessel (*supra*, p. 10), there is not even the link of union affiliation between officers and men which could conceivably adversely touch representation of the employer in grievance adjustment. Accordingly, although section 8(b)(1)(B) pivots on representation of the employer "for the purpose of collective bargaining or the adjustment of grievances," the Board finds a violation of that section in this case where that interest of the employer is not even tangentially implicated.

The Court should grant certiorari in this case and set it for argument in conjunction with the *Electrical Workers* case. The different perspective cast by the separate situations in each case throws a cross-light on section 8(b)(1)(B) which focuses the question of its meaning with maximum clarity and intensity. Joint consideration affords a superior opportunity for full exposure, enhanced insight, and informed delibera-

tion. The interpretation of section 8(b)(1)(B), novel in each case,[5] was first adopted by the Board almost a quarter of a century after its enactment, and is grave in its consequences to strike solidarity in *Electrical Workers* and to work preservation in this case. Joint consideration, illuminating section 8(b)(1)(B) in full dimension, should measurably assist in reaching a right reading of that section.

But should the exigencies of calendaring bar joint argument, comparison with *Electrical Workers* shows that the reading of section 8(b)(1)(B) adopted in this case has now carried the reach of that section beyond any reasonable interpretative stretch, and this case should therefore be heard regardless of the outcome in *Electrical Workers*.

II

The Court of Appeals holds that a union which has rank-and-file employees among its members cannot resort to self-help to protect the jobs of the supervisors it represents when grievance adjustment is one of the

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[5] The novelty in this case is emphasized by this Court's decision in *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Assn.*, 382 U.S. 181 (1965). There, although the conduct alleged was economic pressure "to impose representation on unwilling supervisors" (*id.* at 193, n. 14), the Court held that peaceful picketing to achieve this end was neither arguably protected nor prohibited by the National Labor Relations Act. Yet, under the expansive view of section 8(b)(1)(B) adopted in this case, the picketing was surely arguably prohibited by that section because, if successful, it would tend to deprive the ship operator of the services of any officer who did not choose to stay with the ship in a union-represented position. But, given the correctly narrower concept of section 8(b)(1)(B) which prevailed until recently, it did not occur to anyone that section 8(b)(1)(B) could even be arguably implicated in *Hanna*.

functions that the supervisors perform. Since most supervisors do participate in grievance adjustment, the decision below vitally affects almost the entirety of supervisory labor relations. It imposes a choice between two equally unacceptable alternatives: either to create a simon-pure supervisory union or to have no means of self-defense to protect against employer action adverse to the supervisor-adjuster's economic interest in getting or keeping a job. Impalement on either horn of this dilemma presents questions of fundamental importance in the conduct of supervisory labor relations.

1. "Foreman membership in unions and the inclusion of foremen under agreements covering production workers are general in the printing and building trades, in the metal trades insofar as they operate on a craft basis, in many of the railroad trades, and to a greater or lesser extent, among the teamsters, longshoremen, and others."[6] Such membership of foremen in the same union as production workers "has been a longstanding practice."[7] MMP and MEBA are the two principal unions in the maritime industry representing supervisory personnel and in each rank-and-file employees comprise a substantial part of their membership.[8] And Congress was fully aware of the history of union representation of supervisors when it

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[6] Bur. Lab. Stat., Bulletin No. 745, Union Membership and Collective Bargaining by Foremen, 1 (1943).

[7] *Id.* at 2.

[8] *International Organization of Masters, Mates and Pilots of America* v. *N.L.R.B.*, 351 F.2d 771 (C.A.D.C., 1965); *National Marine Engineers Beneficial Association* v. *N.L.R.B.*, 274 F.2d 167 (C.A. 2, 1960).

enacted the 1947 amendments to the National Labor Relations Act (*infra*, pp. 35-36).

In these many and important industries, in which union membership in and representation of supervisors by mixed unions is traditional, it is now a practical impossibility to create simon-pure supervisory unions. Organizational, financial, beneficial and personal ties are too strong and imbedded to permit so radical a restructuring at so late a date. The alternative of creating simon-pure supervisory unions is therefore an unrealistic option.

2. Since the establishment of a simon-pure supervisory union is a Hobson's choice, the actual consequence of the decision below is to divest supervisor-adjusters and the unions which represent them of any means of self-defense to resist loss of jobs and job opportunities.

(a) This case exemplifies the foremost realistic risk. Jobs traditionally held aboard a vessel by one group of officers can be taken from them because it is cheaper to operate with another group of officers and the ousted group cannot even peacefully picket in an effort to recover their work. Given the existing unfortunate maritime union rivalry, and the natural desire of any ship operator to decrease his labor cost and increase his profit, shifts in officer complement to effectuate a cost saving can be expected upon the expiration of any existing agreement or where none exists.[9] The deterrent to that eventuality which until now has controlled its incidence is the availability of self-help to the ousted group. The decision below illegalizes recourse to self-

[9] *E.g.*, *MM&P* v. *American Oceanic Corp.*, 57 CCH Lab. Cas. ¶ 12,467 (D.C.S.D.N.Y., 1968).

help and therefore removes the deterrent. The entirely predictable outcome is to undermine job security as employers seek to effectuate a cost saving by shifts in crew complement. Since the decision below other ship operators have sought to emulate the employer's conduct in this case, and similar section 8(b)(1)(B) charges are pending before the Board. And this danger to job security exists not only in the maritime industry but in every other where the opportunity for such exploitation is realistically present.

(b) Except for the master and chief mate, the practice in the maritime industry in the hiring of officers is for the employer to secure his required complement by referral from the union with which he has contracted (see J.A. 138, 174-175). As stated in the standard MMP agreement (res. ex. 7, § 2(i), p. 8):

> Subject to the exceptions set forth in this Agreement with respect to Masters* and Chief Officers, the Employer agrees when filling a permanent or temporary vacancy, after giving effect to transfers or promotions from within the seniority list, that the employee shall be obtained through the offices of the Organization from off the Board from the Offshore Shipping List . . . .

As this Court has observed, "the hiring hall came into being 'to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers.' . . . [I]n fact it has served well both labor and management—particularly in the maritime field and the building and construction industry." *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 672 (1961).

The hiring hall restricts the employer in his free choice of grievance adjusters because it does limit his

selection to the personnel referred by the union. Thus, under the mechanical view of section 8(b)(1)(B) adopted by the decision below, a union would be barred from resort to self-help to maintain the hiring hall should an employer oppose employment through it. Continuation of a rotational system of employment essential to an equitable distribution of employment opportunities would exist by employer sufferance alone. And illegalization of resort to self-help in order to protect a valuable hiring method would not be confined to the maritime industry but would extend to every other where union referral is the medium of employment.

(c) The standard MMP agreement provides in part that (res. ex. 7, § (e)(2), p. 7):

> Each Employer shall adhere to the policy of promotion or demotion from within the ranks of its Licensed Deck Officers (including Master*) and seniority shall prevail unless the necessary qualifications are unequal. Subject to the provisions of this Agreement, the Employer shall have the right to discharge employees for just cause.

Promotion from within, employment priority for the senior of equally qualified employees, and protection against discharge without just cause are common not only in the maritime industry but in every other industry where supervisors are union-represented. Each of these benefits restricts the employer in the free choice of his supervisor-adjusters. The mechanical interpretation of section 8(b)(1)(B) embraced by the decision below would therefore bar resort to self-help to protect these benefits from elimination by an employer insistent upon maintaining an utterly free hand.

The decision below thus seriously jeopardizes job security, pension stability,[10] equitable hiring procedures, and fair promotion and tenure practices in the maritime industry and in every other where union representation of supervisors prevails. It is therefore hard to overstate the importance of the question presented by the interpretation of section 8(b)(1)(B) adopted by the decision below in the conduct of supervisory labor relations.

III

The Board's interpretation of section 8(b)(1)(B) approved below rests on three fundamental errors: (1) it misconceives the function of section 8(b)(1)(B); (2) it overlooks that, while supervisors were in 1947 divested of statutory protection, they retained their right to self-protection by resort to self-help; and (3) it undercuts the explicit command of section 14(a) of the Act that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . . ."

1. The dominating motif in the Board's interpretation of section 8(b)(1)(B) is that the MMP's picketing is within the literal ban of that section. But, without looking to other guides to interpretation, the words themselves do not bear the singular literal import at-

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[10] All maritime union pensions plans are industry-wide. Pension funding is based on industry-wide aggregate contributions, and pension eligibility is based on industry-wide employment. In recent years the industry has contracted for economic reasons. If, in addition, employers can break off collective bargaining relations at will, thus contracting further the pool of participating companies, then not only will the affected employees lose their pension eligibility, but the costs to the remaining employers will skyrocket. The industry can simply not afford this.

tributed to them. Section 8(b)(1)(B) bars a labor organization from restraining "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." These words are subject to three equally acceptable literal readings. They may mean, as the Boards says, that so long as "collective bargaining or the adjustment of grievances" are among the functions of an individual, then his selection by the employer must be free of union restraint even if the union's objection to him has nothing to do with his exercise of his responsibility for collective bargaining or grievance adjustment. Or, secondly, the words may mean that the employer is free of union restraint in selecting an individual to represent him when the union's objection to that individual pertains to his performance for his employer of the function of "collective bargaining or the adjustment of grievances." Or, thirdly, the words may mean that, so long as the dispute relates solely to the supervisors' own employment problems, section 8(b)(1)(B) has no application at all because "selection of representatives" appertains only to "collective bargaining or the adjustment of grievances" vis-a-vis statutory employees, a matter not involved in dealing with union-represented supervisors concerning their own economic problems. The words yield no plain meaning by which to choose among these rival interpretations.

2. But "[e]ven on the doubtful premise that the words" of section 8(b)(1)(B) have a plain meaning, "this does not end inquiry into Congress' purpose in enacting the section."[11] For a plain meaning and a

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[11] *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612, 619 (1967).

perfect syllogism are often no more than "a bit of verbal logic from which the meaning of things has evaporated." [12] And so it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." [13] "That principle has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.' " [14] "That is why all relevant aids are summoned to determine meaning." [15]

3. We therefore look to the reason underlying section 8(b)(1)(B). Described by Senator Taft as "not perhaps of tremendous importance," [16] the section has a very modest role which evoked no opposition.[17] Its design is to parallel the employees' freedom to choose their representatives without employer constraint with equivalent freedom of the employer to choose its repre-

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[12] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 191 (1941).

[13] *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892).

[14] *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612, 619 (1967).

[15] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 185 (1941).

[16] 93 Cong. Rec. 3837, in 1 Leg. Hist. 1012. "Leg. Hist." refers to the two-volume edition of the Legislative History of the Labor Management Relations Act, 1947 (U.S. Gov't. Print. Off., 1948).

[17] S. Rep. No. 105, 80th Cong., 1st Sess., 21; *id.*, Minority Views, 41; 93 Cong. Rec. 3837, 4143, 4904; respectively in 1 Leg. Hist. 427, 503; 2 Leg. Hist. 1012, 1077, 1454.

sentatives without union constraint. Specifically, an employer was not to be coerced in his decision to be represented or not represented by an employer association, his determination either way to be an unpressured choice to be made as he sees fit; similarly, an employer was not to be coerced in his selection of a foreman or other individual to adjust grievances for him, his determination of his representative for this purpose to be unpressured by a union's displeasure with or liking for a particular person's grievance handling. Thus, as the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 21, in 1 Leg. Hist. 427):

> . . . [A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

Similarly, Senator Taft explained that (93 Cong. Rec. 3837, in 2 Leg. Hist. 1012):

> . . . [E]mployees cannot say to their employer, "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." . . . Under this provision it would be impossible for a union to say to a company, "We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally." Under the bill the employer has a

> right to say, "No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with."

Finally, Senator Ellender observed that (93 Cong. Rec. 4143, in 2 Leg. Hist. 1077):

> The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill . . . makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official . . . . [Q]uite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences.

Thus, the mischief at which section 8(b)(1)(B) is aimed is foisting on an employer a representative he does not want but the union prefers, or forcing him to give up a representative he desires but who is objectionable to the union, when they face each other in collective bargaining or grievance adjustment. Protection of the employer's freedom to choose a representative focuses, as the section states, on "selection . . . for the purposes of collective bargaining or the adjustment of grievances." It is that function which is protected, and therefore the relevant inquiry when a union is charged with violating section 8(b)(1)(B) is whether it objects to the employer's choice because it dislikes the way in which he may represent the employer in collective bargaining or grievance adjustment.

But the Court of Appeals disdains this reading, deprecating a "*post hoc* inquiry into . . . motives", and scorning "resting . . . legality . . . on an open-ended inquiry into the 'real purpose' " of the actor (*infra*, pp. 9a-10a). Yet the entirety of the statute pitches the validity or invalidity of conduct on just such a search into the reasons for action. Thus, in determining whether an employer has breached his obligation to refrain from discriminating and a union its correlative obligation to refrain from causing him to discriminate (§§ 8(a)(3), 8(b)(2)), "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 675 (1961). Similarly, in determining whether an employer and a union have discharged their reciprocal duty to bargain with each other "in good faith" (§§ 8(a)(5), 8(b)(3), 8(d)), the inquiry goes to whether "the motive that actuated the conduct in question was in fact what the actor ascribes to it: *i.e.* that what he gives as his motive was in truth his motive." *N.L.R.B.* v. *James Thompson & Co., Inc.*, 208 F.2d 743, 745 (C.A. 2, 1953) (L. Hand, C.J.). Likewise, whether a union has engaged in a secondary boycott, a jurisdictional strike, or organizational or recognitional picketing prohibited by the Act depends on ascertaining whether "an object" of its activity is of the proscribed kind (§§ 8(b)(4), 8(b)(7)), a " 'difficult' " task in " 'drawing of lines more nice than obvious . . . .' " *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612, 645 (1967).

An inquiry into motive which is central in the adjudication of other basic unfair labor practices does not suddenly become too onerous to make when an alleged violation of section 8(b)(1)(B) is at issue. As

the court below has itself observed, "Section 8(b)(1)(B) is, to a large degree, the correlative of the Section 7 guarantee to employees of the 'right to bargain collectively through representatives of their own choosing.'" *Meat Cutters Union Local 81* v. *N.L.R.B.*, 458 F.2d 794, 798, n. 10 (C.A.D.C., 1972). Were an employer to discharge an employee who was also a union representative, the decision as to the legality or illegality of that dismissal would have to rest on whether it was based on the employee's exercise of his representational functions or on activity outside the Act's protection. *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311 (1965). There is no slightest reason why the identical inquiry should not be required in the exactly parallel situation where it is a union which is said to have sought or caused the separation of an employer representative. As in the case of the employer, so in the equivalent case of the union, the necessary question is whether the protected exercise of representational authority was the reason actuating the union's objection to the employer's representative. If it was, section 8(b)(1)(B) has been violated; if it was not, section 8(b)(1)(B) is indifferent to it.

4. This interpretation of section 8(b)(1)(B) is essential in order to give rounded effect to the status that Congress gave supervisors in 1947. For, while Congress at that time divested supervisors of statutory protection, it preserved their common law right to self-protection by resort to self-help.

The beginning point is this Court's decision on March 10, 1947, in *Packard Motor Car Company* v. *N.L.R.B.*, 330 U.S. 485 (1947), interpreting the National Labor Relations Act prior to its 1947 amendment. By a 5-4 margin, this Court decided that su-

pervisors were employees within the meaning of the Act and therefore entitled to its protection. But while the division of the Court was sharp on this issue, the premise from which analysis began was uniform and unanimous. As expressed by Mr. Justice Jackson for the majority, "the company concedes that foremen have a right to organize. What it denies is that the statute compels it to recognize the union. In other words, it wants to be free to fight the foremen's union in the way that companies fought other unions before the Labor Act." *Id.* at 490. As Mr. Justice Douglas stated in dissent, "What I have said does not mean that foremen have no right to organize for collective bargaining. The general law recognizes their right to do so." *Id.* at 500. Accordingly, all granted the "altogether distinct . . . common-law right of workmen to combine . . . ."[18] What was at issue was whether that common law right had been accorded statutory protection. And the majority concluded that "there is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests would be better served by organization than by individual competition." *Id.* at 490.

It was this interpretation of the Act that Congress reversed by its 1947 amendments. By providing that "the term 'employee' . . . shall not include . . . any individual employed as a supervisor" (§ 2(3)), Congress did deny statutory protection to supervisors, but by further providing that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organiza-

[18] *Fay* v. *Douds*, 172 F.2d 720, 724 (C.A.2, 1947) (L. Hand, C.J.).

tion" (§ 14(a)), Congress left untouched their common law right to combine.[19] The result, as all understood, was to remit the supervisor "to the alternative of economic self-help . . . ." [20] Accordingly, the "Taft-Hartley changes, while they do not outlaw foremen's unions, leave both foremen and employers to their economic weapons—the former to strikes and picketing to compel recognition, the latter to discriminatory discharges, espionage, and blacklists to combat efforts to organize." [21]

In this case, the peaceful picketing conducted by the MMP to recover for the MMP master and mates the jobs aboard the *Floridian* which they had traditionally held but which had been taken from them exactly

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[19] H. Rep. No. 245, 80th Cong., 1st Sess., 17; S. Rep. No. 105, 80th Cong., 1st Sess. 5, 19, 28; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 60; 93 Cong. Rec. 3423; respectively in 1 Leg. Hist. 308, 411, 425, 434, 564, 613; 93 Cong. Rec. 3836, 4136-37, respectively in 2 Leg. Hist. 1008-09, 1065.

[20] H. Min. Rep. No. 245, 80th Cong., 1st Sess., 72; S. Min. Rep., No. 105, 80th Cong., 1st Sess. 39, 40; 93 Cong. Rec. 3446, 7486; respectively in 1 Leg. Hist. 363, 501, 502, 652, 916.

[21] Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 5 (1947). See also, Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 Mich. L. Rev. 593, 600 (1948): "The result is that the collective bargaining position of such employees is to be determined by the parties themselves, not by law. This restores the situation to the status quo ante the original NLRA." And see, *District 2, MEBA v. New York Shipping Association*, 22 N.Y.2d 809, 812 (1968), cert. denied, 393 U.S. 960 (1968): "Section 14(subd.[a]) of the Labor Management Relations Act prevents supervisors' unions from claiming the benefit of statutes requiring employees to bargain collectively but does not limit their right to engage in otherwise lawful picketing (Bull S.S. Co. v. National Mar. Eng. B. Assn., 250 F.2d 332, 339; see Hanna Min. v. Marine Engrs., 382 U.S. 181, 189."

epitomizes the kind of dispute that Congress placed within the economic arena and left to arbitrament by self-help. It goes almost without saying that " 'practically always the crux of a labor dispute is who shall get the job, and what the terms shall be . . . .' " *United States* v. *Local 807, Teamsters,* 315 U.S. 521, 531 (1942). The matrix of the most fundamental of industrial conflicts is "competition for jobs . . . ." *United States* v. *Hutcheson,* 312 U.S. 219, 233 (1941). Work preservation is indeed at the core of statutorily-safeguarded activity when undertaken by employees within the Act's protection.[22] When Congress withdrew supervisors from the protective purview of the Act, it divested them of statutory safeguards in seeking to preserve their work, but it did not take from them their preexisting common law right to self-protection by resort to self-help to save their jobs.

To interpret section 8(b)(1)(B) to prohibit self-help by and for supervisors when work preservation is its aim is thus to break faith with the scheme that Congress fashioned in 1947 in treating with supervisors. Congress withdrew statutory protection from them; it did not divest them of self-protection. And this is especially evident when, as here, the means employed is peaceful picketing. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undersirable"; out-

[22] *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967); *Houston Insulation Contractors Assn.* v. *N.L.R.B.*, 386 U.S. 664 (1967); *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964); *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959).

lawry of peaceful picketing is eschewed absent " 'the clearest indication in the legislative history' . . . that Congress intended to do so as regards the particular ends of the picketing under review"; and this scrupulousness reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 62-63 (1964). That teaching is fully pertinent in the present case. Work preservation is no part of any evil at which Congress has aimed. It has nothing to do with union constraint to require an employer to choose one rather than another individual to represent him in collective bargaining or grievance adjustment based on displacing the employer's choice with the union's preference, which is the province of section 8(b)(1)(B). It has nothing to do with the power given the employer free of statutory governance "to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations",[23] which is the basis for denying statutory protection to supervisors (*supra,* p. 32, n. 19). As here, when peaceful picketing is so clearly outside any mischief that Congress has concretely identified, and when recourse to it is so clearly within the area of self-protection that Congress preserved for the supervisor, there is no room for an interpretation which bans it.

5. According to the Court of Appeals, the only way by which MMP can resort to self-help to defend the supervisor-adjusters it represents against inroads on their work is to become a simon-pure supervisory union. "Such a union . . . cannot commit an unfair

[23] *Carpenters District Council of Milwaukee County* v. *N.L.R.B.,* 274 F.2d 564, 566 (C.A.D.C., 1957).

labor practice under any of the subsections of Section 8(b), including Section 8(b)(1)(B)" (*infra*, p. 7a). We have already shown that conversion into a simon-pure supervisory union is a practical impossibility (*supra*, pp. 20-21). We now show that imposition of that illusory option is indefensible as a matter of law.

Confinement of membership to a simon-pure supervisory union as the price of self-defense affronts the express stricture of section 14(a) that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . . ." By statutory definition the "term 'labor organization' means" one "in which employees participate" (§ 2(5)), so that section 14(a) expressly preserves supervisory membership in unions which also include rank-and-file employees. And in this instance Congress intended the plain meaning that its words denote. It knew of the "long history of successful union activities on the part of supervisors in the building industry, the maritime industry, the printing industry, and the railroad industry . . . ."[24] This history included membership of supervisors in the same union with rank-and-file employees (*supra*, p. 20). What Congress preserved, therefore, was supervisory membership in mixed as well as simon-pure unions.

Indeed, in insisting upon simon-pure supervisory unions as the price of self-protection, the Court of Appeals imposes a compromise that Congress rejected, and unwittingly puts the supervisor in more straitened

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[24] S. Min. Rep. No. 105, 80th Cong., 1st Sess., 40; H.Min. Rep. No. 245, 80th Cong., 1st Sess., 72; 93 Cong. Rec. 3418, 3446; respectively in 1 Leg. Hist. 502, 363, 604, 652; 93 Cong. Rec. 4350, in 2 Leg. Hist. 1162.

circumstances than Congress contemplated. To meet the argument against dividing the supervisor's loyalty in serving his employer, but to preserve a measure of statutory protection for the supervisor in seeking collective bargaining to further his self-interest as an employee, the proponents of statutory protection proposed that the supervisors limit their organization to simon-pure supervisory unions and that they be statutorily safeguarded when they confine their concerted activity to unions restricted to themselves.[25] Accordingly, to accomplish this end, only simon-pure supervisory unions would be eligible for certification as a bargaining representative of supervisors, except in those situations where representation by a mixed union was the "prevailing custom prior to July 1, 1935 . . . ."[26] But this compromise was voted down.[27] Instead, the view which prevailed was that *"Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the rank and file."*[28]

Accordingly, what Congress did was to deny statutory protection to supervisors whether they organized into simon-pure supervisory unions or into mixed unions. What it did *not* do was to make their right

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[25] S. Min. Rep. No. 105, 80th Cong., 1st Sess., 40, in 1 Leg. Hist. 502; 93 Cong. Rec. 4350, 4440, 4904, 4985, 5005, 6501, 6527, in 2 Leg. Hist. 1162, 1214, 1452, 1460, 1480, 1576, 1606.

[26] 93 Cong. Rec. 5117, in 2 Leg. Hist. 1521.

[27] *Ibid.*

[28] H. Rep. No. 245, 80th Cong., 1st Sess., 15 (emphasis in original), in 1 Leg. Hist. 306; 93 Cong. Rec. 3836, 5116, in 2 Leg. Hist. 1008-09, 1519.

to self-help dependent upon whether they organized into simon-pure or mixed unions. Yet the decision below does just that. For it distinguishes between simon-pure and mixed unions and allows recourse to self-help only when the supervisor undertakes it through a simon-pure union. This is destructive of Congress' plan.

The preoccupation by the court below with the mixed or simon-pure character of the union to which the supervisor belongs has been justly criticized by the Ninth Circuit as a "rather mechanical approach to . . . statutory interpretation . . . ." *Dente* v. *International Organization of Masters, Mates, and Pilots, Local 90,* 84 LRRM 2982, 2983 (C.A. 9, 1973). Thus, in considering the status of a simon-pure supervisory union and its right to sue for breach of contract pursuant to section 301 of the Labor Management Relations Act, 1947, the Ninth Circuit concluded that Congress "did not intend to deprive members of 'supervisory unions' of the rights secured by section 301," rejecting the argument that the union was not a statutory "labor organization" and relying instead on the view that the right to bring an LMRA § 301 action was wholly outside the mischief at which Congress aimed in denying supervisors bargaining and organizational protection. *Ibid.* Similarly, in dealing with the claim that a simon-pure supervisory union was not subject to the "national emergency" strike provisions of section 208 of the Labor Management Relations Act, 1947, because it did not represent statutory "employees," the Second Circuit held that the emergency procedure does apply because freedom from this requirement was no part of the purpose of Congress in denying statutory protection to supervisors. *United States* v. *National Marine Engineers' Beneficial Assn.,* 294 F.2d 385,

390-393 (C.A. 2, 1961). So here, the legality of the activity turns, not upon the irrelevancy of the simon-pure or mixed membership of the union to which the supervisor-adjusters belong, but upon the fact that the right to peacefully picket to recover their lost jobs is no part of the evil that Congress perceived in denying them statutory protection but in preserving their right to self-protection.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and the case should preferably be set down for argument together with *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* AFL-CIO, October Term, 1973, No. 73-795.

Respectfully submitted,

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February 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1595

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION ILA, AFL-CIO, and UNION DE TRABAJADORES DE MUELLES Y RAMAS ANEXAS, LOCAL 1740 ILA, AFL-CIO, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Filed November 15, 1973

Judgment

Before: Bazelon, Chief Judge, Wright and MacKinnon, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the International Organization of Masters, Mates and Pilots, International Marine Division, ILA, AFL-CIO and Union De Trabajadores De Muelles y Ramas Anexas, Local 1740, ILA-AFL-CIO, to review an order of the National Labor Relations Board issued against Petitioners, on June 12, 1972, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 22, 1973, and has considered the briefs and transcripts of the record filed in this cause. On October 4, 1973, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the International Organization of Masters, Mates and Pilots, International Marine Division, ILA, AFL-CIO and Union De Trabajadores De Muelles y Ramas Anexas, Local

1740, ILA-AFL-CIO, their officers, agents, and representatives abide by and perform the directions of the Board in said order contained.

/s/ J. SKELLY WRIGHT
J. Skelly Wright
Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ GEORGE E. MACKINNON
George E. MacKinnon
Judge, United States Court of Appeals for the District of Columbia Circuit

Chief Judge Bazelon dissents from the foregoing judgment for the reasons set forth in his dissenting opinion of October 4, 1973.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1595

SEPTEMBER TERM, 1973

[Same Case]

Before: Bazelon, Chief Judge; Wright and MacKinnon, Circuit Judges

Filed December 3, 1973

Order

On consideration of Petitioners' petition for rehearing, it is ORDERED by the Court that Petitioners' aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1595

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO and UNION DE TRABAJADORES DE MUELLES Y RAMAS ANEXAS, LOCAL 1740, ILA-AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
MARINE & MARKETING INTERNATIONAL CORPORATION, INTERVENOR

Petition to Review and Cross-Application to Enforce an Order of the National Labor Relations Board

Decided October 4, 1973

Burton M. Epstein for petitioners. *Seymour M. Waldman* and *Julian H. Singman* were on the brief for petitioners.

Joseph C. Thackery, Attorney, National Labor Relations Board, with whom *Marcel Mallet-Prevost*, Assistant General Counsel at the time the brief was filed, and *John D. Burgoyne*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Alan A. Bruckner entered an appearance for intervenor.

Before BAZELON, *Chief Judge*, and WRIGHT and MACKINNON, *Circuit Judges*.

Opinion *per curiam*.

Dissenting opinion by *Chief Judge* BAZELON at p. 10.

PER CURIAM: Until November 1970 the container vessel *Floridian* was operated by South American Caribbean Lines (SACAL) on runs between Miami, Florida and San Juan, Puerto Rico. The ship's master and three mates

were represented by petitioner International Organization of Masters, Mates and Pilots (MM&P). Engineering officers were represented by Marine Engineers Beneficial Association (MEBA) and unlicensed seamen by the Seafarers International Union (SIU). SACAL went bankrupt in November 1970 and the *Floridian* was decommissioned and put under Government supervision in Norfolk, Virginia. In March 1971 a new company, Marine & Marketing International Corporation (the company), was formed for the purpose of recommencing operations.

Instead of filling the *Floridian's* crew through the same unions whose members had previously serviced the vessel, the company signed a prehire agreement with MEBA covering all licensed deck officers and engineers. The motive behind this change was apparently not any dissatisfaction with the performance of the former MM&P deck officers. Rather, the new arrangement was financially beneficial to the company as MEBA agreed to elimination of one engineering job and SIU, which continued as representative of the unlicensed seamen, agreed to elimination of three seaman's jobs. This arrangement, combined with certain changes in the wage structure effected by the shift to MEBA, evidently saved the company about $100,000 per year.

Pursuant to the prehire agreement, a new master and three new mates, all MEBA members, were hired and reported at Norfolk to prepare the *Floridian* for its first sailing. While the vessel was still at Norfolk, a representative of MM&P contacted the company's president, Eduardo Garcia, and asked when he was going to order officers for the vessel. Garcia thereupon informed the MM&P representative that the company already had made arrangements with MEBA for officers. The MM&P representative, according to Garcia, said the company was "making a big mistake" and, since MM&P was now affiliated with the International Longshoremen's Associa-

tion,[1] there could be "some serious consequences." Garcia later met with the president of MM&P, who said the officer jobs belonged to MM&P by tradition as MM&P officers had manned the *Floridian* since it was first constructed. The MM&P president also told Garcia that he would rather see the vessel laid up than be operated by MEBA.

Despite these threats, the *Floridian* set sail from Norfolk to Miami to take on cargo for its first voyage under new management. At the pier in Miami the former captain and two former mates, all members of MM&P, picketed the vessel. The picket signs indicated that MM&P was affiliated with the International Longshoremen's Association (ILA), and members of a Miami local of ILA, not charged herein, observed the picket line and refused to load the ship. The company obtained a temporary restraining order in state court, the ship was loaded, and it set sail for San Juan. When the ship arrived there the same officers who had picketed in Miami appeared again, carrying the same picket signs except that they were now written in Spanish. Members of petitioner Local 1740, Union de Trabajadores de Muelles y Ramas Anexas, ILA, on instructions from their union, refused to cross the picket line. The vessel remained unloaded for six weeks until an injunction stopped the picketing.

The Board found that MM&P and Local 1740 committed an unfair labor practice under Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) (1970), which provides: "It shall be an unfair labor practice for a labor organization or its agents

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[1] In fact, on March 31, 1971 MM&P and ILA announced that the Executive Board of ILA had decided to issue a charter of affiliation to MM&P. At the time of the trial examiner's hearing herein a ratification ballot aimed at approval of the Executive Board's resolution was being processed but had not yet been completed.

• • • to restrain or coerce • • • an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." We decline petitioners' invitation to set aside that finding.

I

It is conceded by all parties that MM&P's actions come within the literal purview of the statutory language. The admitted purpose of the picketing was to pressure the company to break its contract with MEBA, fire the new MEBA master and mates, and rehire the former MM&P master and mates. The Board was obviously correct in concluding that the master and mates are representatives of the employer for the adjustment of grievances. Therefore, under the statutory language the picketing was intended to coerce the employer in the selection of his grievance adjusting representatives.

Petitioners argue, however, that when Congress enacted Section 14(a) of the Act, 29 U.S.C. § 164(a) (1970), and thereby deprived supervisors (including grievance adjusters[2]) of the protections of the Act, Congress intended to allow supervisors to resort to self-help to protect their interests, as they concededly did here. On this approach Section 8(b)(1)(B) would be inapplicable to the picketing here, provided petitioners are not a labor union protected by the Act and therefore subject to its restrictions. The legislative history may well be read as evidencing a congressional purpose to permit supervisors to resort to self-help. *See, e.g.*, 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 613 (1948); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 4-5 (1947). Section 8(b), by its terms, applies only to "a labor or-

[2] "The term 'supervisor' means any individual having authority, in the interest of the employer, • • • to adjust [employee] grievances • • •." 29 U.S.C. § 152(11) (1970).

ganization or its agents * * *." A union composed solely of supervisors is not a "labor organization" as that term is defined in the Act. *See* 29 U.S.C. § 152(b) (1970). It has no statutory "employees." *See* 29 U.S.C. § 152(3). Such a union, therefore, cannot commit an unfair labor practice under any of the subsections of Section 8(b), including Section 8(b)(1)(B).

The main difficulty with MM&P's position in the present case is that it admittedly *is* a "labor organization" under the Act. Indeed, our own court has recently held that, because MM&P has certain locals containing statutory "employees," it constitutes a "labor organization" subject to the restrictions of Section 8(b). *See Int. Org. of Masters, Mates & Pilots* v. *NLRB*, 122 U.S.App.D.C. 74, 80, 351 F.2d 771, 777 (1965).

Nor do we think it significant that in this particular instance MM&P's efforts were directed on behalf of workers all of whom were supervisors. As Judge Friendly has said, it may be that exempting unions composed solely of supervisors from Section 8(b) was considered by Congress as a *"quid pro quo"* for having deprived them of the protections of the Act.

> "But the legislative history is far from being so definite or persuasive as to justify our reading the Act, in a manner opposed to its plain language, so as to permit a union in which 'employees participate' to engage in acts branded as unfair labor practices by § 8(b) simply because the workers on whose behalf the union was acting are all supervisors."

National Marine Engineers Beneficial Assn v. *NLRB*, 2 Cir., 274 F.2d 167, 173 (1960).

At first glance it might seem that this interpretation of the Act produces a rather arbitrary result, since the participation of "employees" in MM&P here has no real relevance to the facts of the present case. But under the Act this interpretation works in favor of MM&P as well

as against it. Because it is a "labor organization" MM&P obtains certain statutory protections. For example, Section 8(a)(2), 29 U.S.C. § 158(a) (2), makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of *any labor organization* or contribute financial or other support to it * * *." (Emphasis added.) Similarly, Section 8(a)(3), 29 U.S.C. § 158(a) (3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in *any labor organization* * * *." (Emphasis added.) MM&P would forfeit the protections of these provisions were it a union composed solely of supervisors and hence not a "labor organization."

Therefore, even though we agree with the general proposition that Congress intended to permit supervisors to resort to self-help, a supervisors' union cannot have it both ways. If it allows statutory "employees" to participate, it becomes a "labor organization" entitled to the protections given such organizations and subject to the restrictions imposed by Section 8(b) on such organizations. If it does not allow any "employees" to participate, it is freed of any responsibilities under Section 8(b) at the price of forfeiting the protections of Section 8(a).

II

Petitioners next contend that, even if they are subject to its restrictions, Section 8(b) (1) (B) was never intended to reach the picketing that took place here. They argue that Section 8(b) (1) (B), so far as it pertains to grievance adjusters, is concerned solely with attempts by a labor organization to change the person utilized by the employer to adjust the grievances of members of that same organization. For example, there would be an unfair labor practice under Section 8(b) (1) (B) here if

SIU attempted to coerce the selection of the master and mates since the unlicensed seamen represented by SIU have their grievances adjusted by the master and mates.

We have examined the legislative history with care, and there is some evidence that Congress' primary concern was with situations falling within petitioner's interpretation of the Act. *See* 2 LEGISLATIVE HISTORY, *supra*, at 1012, 1077. But we have found nothing showing that Congress intended not to reach conduct of the sort that took place in this case—conduct which all parties agree comes within the statute's literal scope. If anything, Congress simply did not address itself to the specific problem that has arisen here, probably because it assumed that supervisors wanting to engage in this kind of picketing would avail themselves of the opportunity not to be classified as a "labor organization" and thus be free of all the restraints of Section 8(b).

While we are aware that labor legislation does not readily adapt itself to the "plain meaning" school of jurisprudence, *see, e.g., National Woodwork Manufacturers Assn* v. *NLRB*, 386 U.S. 612, 619 (1967), we believe several factors militate against judicially creating an exception that would immunize MM&P's conduct here. First, petitioners concede in their brief that if the company's desire to deal with MEBA rather than MM&P was based on a valid Section 8(b) (1) (B) interest, *i.e.*, the company's interest in the supervisory skills, qualifications or loyalties of the members of the respective unions, rather than upon financial considerations, then its decision to choose one union over the other should properly be free from coercion under the statute. This would mean that in each case where a labor organization such as MM&P or MEBA sought to put its men on a vessel presently staffed with officers of the other, the legality of their picketing would depend on the employer's reasons for ultimately choosing one union rather than the other. We doubt that Congress intended any such

post hoc inquiry into the employer's motives where the union's action is directly and inherently destructive of a right guaranteed in the statute—the right to be free from coercion in the selection of grievance adjusters. The coercive nature of MM&P's picketing, especially in light of MM&P's successful efforts to capitalize on its affiliation with ILA, precludes resting the legality of MM&P's picketing on an open-ended inquiry into the company's "real purpose" in choosing MEBA over MM&P. The company has an interest in being free from coercion from labor organizations in the selection of its grievance adjusters, no matter what its reasons for choosing one union over the other.[3]

In addition, the exception urged upon us by petitioners might well create inequitable results with respect to ensuring that all unions interested in representing the master and mates had equal resort to self-help. Suppose, for example, that MM&P's picketing had been successful at the outset, and that the company had fired the MEBA master and mates and rehired the former MM&P master and mates. One would expect that it would then be MEBA's turn to resort to self-help and picket the vessel. But under petitioners' interpretation of the statute

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[3] Nothing to the contrary is implied in *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Assn.*, 382 U.S. 181 (1965). There MEBA picketed a vessel, claiming that the employer unfairly refused to recognize the union as the bargaining representative of the vessel's engineers. The Supreme Court held that state court jurisdiction to enjoin the picketing was not preempted by federal law as the conduct was not arguably prohibited by Section 8(b). While this may constitute an implicit holding that the picketing there did not violate § 8(b)(1)(B), an obvious difference distinguishes the *Hanna* picketing from that which took place in the instant case. In *Hanna* the picketing was not directed at having certain engineers fired and replaced, as was the case here, but rather at having MEBA recognized as the bargaining representative of then employed engineers, a majority of whom allegedly desired MEBA as their representative.

MEBA might well be precluded from resorting to self-help. MEBA, which like MM&P is a "labor organization" subject to the restrictions of Section 8(b),[4] already represents the engineers on the *Floridian*, and the Board might conclude that the captain serves in some respects as a grievance adjuster for the engineers. MEBA's picketing to regain the master's position would then fall within Section 8(b) (1) (B)'s prohibitions, even under the interpretation put forth by MM&P, since MEBA would be seeking to change the person utilized by the employer to adjust the grievances of MEBA members. The inequities of this situation are obvious.

Given these factors, we think that in this area it is better to stick with the lines drawn by Congress rather than create case-by-case exceptions. Such exceptions, though conceived in an attempt to pursue congressional purposes, might well bring results which are unworkable or inequitable in practice. Congress gave MM&P the right to ignore Section 8(b) if it gives up the status of a "labor organization." Given MM&P's refusal to take advantage of that opportunity, there is little this court can or should do to limit the scope of Section 8(b) as applied to petitioners.

III

Finally, with respect to Local 1740, there was substantial evidence before the Board to support the conclusion that it engaged in joint, concerted action with MM&P, and that Local 1740 members did not simply honor a picket line at their place of work. At the time of the events herein, MM&P was in the process of merging with ILA. Not only was this affiliation spelled out in the picket signs carried by MM&P members, but an ILA agent had warned the company's president that the local

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[4] *See National Marine Engineers Beneficial Assn* v. *NLRB*, 2 Cir., 274 F.2d 167 (1960).

would support MM&P in the dispute, under direction from ILA's New York headquarters.

Accordingly, the petition for enforcement is granted and the petition for review is denied.

So ordered.

BAZELON, *Chief Judge, dissenting*: The central issue in this case is whether Section 8(b) (1) (B) of the National Labor Relations Act [1] prohibits supervisor-employers from engaging in peaceful picketing to protest an employer's actions, when the protest is directed solely to the protection of the supervisors' employment interests and in no way implicates the interests of the employer's rank-and-file employees. The majority agrees with the NLRB that the Section does indeed extend to such a protest, so long as the supervisors—who are not, of course, statutory "employees' themselves [2]—are members of a union to which statutory employees belong. It holds that this is so even though none of the union's members is a rank-and-file employee of the employer whose actions the supervisors protest. I cannot agree.

Section 8(b) (1) (B) provides that it is "an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." For the majority, the proper result in this case follows from the statutory language as a matter of simple logic: (1) Because some of its locals have statutory employees as members, the petitioner International Organization of Masters, Mates and Pilots (MM&P) is a "labor organization" within the meaning of the Act.[3] (2) Supervisor-members of

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[1] 29 U.S.C. § 158(b)(1)(B) (1970).

[2] *See* 29 U.S.C. § 152(3) (1970).

[3] *See* 29 U.S.C. § 152(5) (1970); Int'l. Org. of Masters, Mates & Pilots v. NLRB, 122 U.S. App. D.C. 74, 351 F.2d 771 (1965).

MM&P attempted, by peaceful picketing, to "coerce" an employer into substituting them for the master and mates hired under an agreement with another union. (3) The master and mates are representatives of the employer for the adjustment of grievances. The syllogism is complete. Since MM&P attempted to coerce an employer in his choice of grievance adjustment representatives, the Board was correct in deciding that MM&P had committed an unfair labor practice.

I do not fault the majority's logic. But in defining the premises from which its logical exercise proceeds, the majority has, I think, allowed itself to be led into a *cul de sac* against which the Supreme Court has repeatedly warned: "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' "[4] Moreover, the Court has said, this rule has particular force in the construction of labor legislation—legislation that is, "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests."[5]

In short, the proper scope of Section 8(b) (1) (B)'s prohibition cannot be deduced from the statutory language alone. Our reading of the language must be informed by Congress' intent in enacting the prohibition,

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[4] National Woodworkers Mfrs. Ass'n. v. NLRB, 386 U.S. 612, 619 (1967), quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

[5] Local 1976, United Brotherhood of Carpenters v. Labor Board, 357 U.S. 93, 99-100 (1958); *see* National Woodworkers Mfrs. Ass'n. v. NLRB, *supra*, at 619.

as fairly discerned from the relevant legislative materials. And our inquiry must attend to the place of the section in the complex of statutory provisions that concern the relationship between employers and supervisors.[6]

The Taft-Hartley Act of 1947[7] excludes supervisors from the definition of the term "employee," enabling employers to condition supervisors' employment on nonmembership in unions and nonparticipation in union affairs. Nevertheless, the law does not ban supervisors from wholly supervisory unions or from unions including, or even dominated by, rank-and-file employees. On the contrary, Section 14(a) of the Act[8] specifically provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . . ."[9]

But while preserving supervisors' rights to become and remain union members, the Act denies to supervisors the protections it affords to rank-and-file employees. Supervisors may not resort to federal and state labor relations boards to compel employer recognition, good faith bargaining, and nondiscriminatory treatment. They are, instead, left "to seek redress in self-help" for their economic and organizational grievances:[10]

> The Taft-Hartley Act changes, while they do not outlaw foremen's unions, leave both foremen and employers to their economic weapons—the foremen to strikes and picketing to compel recognition, the

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[6] *See* NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967).

[7] Labor Management Relations Act §§ 1-47, 29 U.S.C. §§ 141-87 (1970), *amending* 49 Stat. 449 (1935).

[8] 29 U.S.C. § 164(a) (1970).

[9] *See* Comment, *The Role of Supervisors in Employee Unions*, 40 U. CHI. L. REV. 184, 187 (1972).

[10] 1 Legislative History of the Labor Management Relations Act of 1947 at 613 (1947).

latter to discriminatory discharges, espionage and blacklists to combat efforts to organize.[11]

The Board's decision in this case restricts the power of supervisors to resort to self-help—a power that Congress intended them to retain—so long as they belong to a union containing statutory employees and so long as their positions involve collective bargaining or grievance adjustment functions. In effect, it places a tax on supervisors' right to remain members of employee unions, a right that Section 14(a) specifically preserves.

I find nothing in the legislative history of Section 8(b)(1)(B) to support, or even favor, a conclusion that Congress intended it so to restrict supervisors' rights. On the contrary, the legislative history makes clear that Congress was concerned with an entirely different problem. The Section was intended to prevent efforts by *employee unions* to coerce employers into choosing, as collective bargaining and grievance adjustment representatives, persons sympathetic to the union's rank-and-file members, rather than persons loyal to the employer.[12] Consistently with this purpose, the Board has extended the Section to include employee union attempts, by discipline or otherwise, to force its supervisor members to perform collective bargaining or grievance adjustment functions in a manner favorable to the union.[13] Before this case, however, the Board has never attempted to

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[11] Cox, *The Labor-Management Relations Act*, 61 HARV. L. REV. 1, 5 (1947); *see* Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 MICH. L. REV. 593, 600 (1948).

[12] *See, e.g.*, 93 CONG. REC. 3953 (1947), 1 Legislative History, *supra* note 7, at 1012 (remarks of Senator Taft). For a full discussion of the legislative history of the Section and its proper construction, see this court's recent *en banc* decision in International Brotherhood of Electrical Workers v. NLRB, Slip Opinion No. 71-1559, at 12-28 (June 29, 1973).

[13] *E.g.*, San Francisco-Oakland-Mailers' Union No. 18, 172 NLRB No. 252 (1968).

apply Section 8(b) (1) (B) to a union that neither represented, nor aspired to represent, the employer's rank-and-file employees. And the reason for this is clear: in such circumstances, the purpose that Congress intended the Section to achieve is simply not implicated.

I would hold that a supervisory union is not a "labor organization" within the ambit of Section 8(b) (1) (B) unless it represents the rank-and-file employees of the supervisors' employer. I think this the only holding consistent with Congress' intent in enacting the Section and with the proper place of the Section in Congress' scheme for dealing with supervisor-employer relations. There is, however, another consideration that strongly militates in favor of this conclusion in this case. The Board has decided that the peaceful picketing in which MM&P's members engaged constituted an unfair labor practice. But the Supreme Court has consistently said that, before ascribing to Congress a purpose to outlaw peaceful picketing, there must be "'the clearest indication in the legislative history' . . . that Congress intended to do so *as regards the particular ends of the picketing under review.*"[14] This rule of construction, grounded as it is in First Amendment guarantees,[15] precludes, I think, the wooden construction of Section 8 (b) (1) (B) that the Board has adopted and the majority approves. The legislative history of the Section quite simply lacks any indication that it was intended to prohibit supervisors from peaceful picketing in protest of their employer's actions, at least when their protest does not even arguably favor the interests of their employer's rank-and-file employees.

Despite these considerations, the majority insists that the Act puts those supervisors who have collective bargaining or grievance adjustment functions to a choice.

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[14] NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 62-63 (1964), *quoting* NLRB v. Drivers Local Union, 362 U.S. 274, 284 (1961). (Emphasis added).

[15] *Id.*

They may either join wholly supervisory unions, to which the prohibitions of the Act are inapplicable, or they must abide Section 8 restrictions on their efforts at self-help. As a practical matter, I doubt that this leaves supervisors or their unions with any real choice at all.[16] In any case I find it clear that no such choice was contemplated by Congress. At most, the purpose of the Act favors a more narrowly drawn, more rational rule: a union may engage in self-help to protect the employment interests of its supervisor-members so long as the union does not at the same time represent rank-and-file employees of the supervisors' employer.

I grant that this rule would, as the majority points out, work some inequity, since unions that represent both supervisors and their subordinates would be restricted in their resort to self-help. In that circumstance, however, Congress' purpose in enacting Section 8(b) (1) (B) is at least arguably involved. I do not understand how avoiding this lesser inequity justifies adopting a construction of the Section that leads to greater inequity—inequity that is, moreover, entirely unjustified by the interests Congress intended the Section to protect.

I would grant the petition for review, reverse the decision of the Board, and deny enforcement of the order. I respectfully dissent.

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[16] The majority contends that, in return for accepting Section 8(b)'s restrictions, supervisory unions containing statutory employees receive certain protections under Section 8(a). But the quid is by no means equal to the quo. For example, a supervisor who becomes a member of a union containing statutory employees might be discharged by his employer and replaced. Since the supervisor is not himself a statutory employee, he would not be able to get redress from the Board on the ground that he had been discriminatorily dismissed in violation of Section 8(a)(3). Yet, under the majority's construction of 8(b)(1)(B), any attempt by the union or the supervisor himself to protest his dismissal would constitute an unfair labor practice. Thus, while the supervisors' union may receive certain statutory protections as a labor organization, the supervisors themselves do not.

APPENDIX D

Trial Examiner's Decision

TXD-100-72

San Juan, P.R.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case No. 24-CB-781

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO and UNION DE TRABAJADORES DE MUELLES Y RAMAS ANEXAS, LOCAL 1740, ILA-AFL-CIO

and

MARINE AND MARKETING INTERNATIONAL CORPORATION.

Martin M. Arlook, Esq., for
the General Counsel.

Ruperto J. Robles, Esq., for
the Charging Party.

Burton M. Epstein, Demtrio Fernandez, and *Marvin Schwartz, Esqs.*, for
Respondent Masters, Mates
& Pilots.

Seymour M. Waldman, Esq.,
Counsel for Respondent
Local 1740, ILA

STATEMENT OF THE CASE

JOHN P. VON ROHR, Trial Examiner: Upon an original charge filed on September 14, 1971, and an amended charge filed on September 20, 1971, the General Counsel of the National Labor Relations Board, by the Regional Director

for the 24th Region (Hato Rey, Puerto Rico), issued a complaint on September 20, 1971, against International Organization of Masters, Mates and Pilots, International Marine Division, AFL-CIO, and against Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, AFL-CIO, alleging that they had restrained and coerced Marine & Marketing International Corporation, herein called the Company, in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances, thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act. The Respondents filed an answer denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on November 8 and 9, 1971, in Hato Rey, Puerto Rico, before Trial Examiner John P. van Rohr. All parties were represented by counsel and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. A brief was received from the General Counsel on January 3, 1972 and a joint brief was received from the Respondents on December 30, 1971. These have been carefully considered. Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. The Business of the Employer

Marine & Marketing International Corporation is a Delaware corporation with its principal office and place of business located at Miami, Florida where it is engaged in the operation of the M/V "Floridian," an American Flag vessel carrying goods and commodities between Miami, Florida and San Juan, Puerto Rico. Since the beginning of its operations on July 30, 1971 the said vessel has transported goods and commodities valued in excess of $50,000 between continental United States and Puerto Rico. The Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

International Organization of Masters, Mates and Pilots, International Marine Division, AFL-CIO and Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.[1]

III. The Unfair Labor Practices

A. *The Facts*

The relevant facts are not in dispute. The M/V "Floridian," a container type cargo vessel, has been part of the American merchant marine for approximately ten years. The owner of this vessel has at all times been Containerships, Inc. For a number of years prior to about November, 1970, the vessel was leased and operated by the South Atlantic & Caribbean Steamship Corp., hereinafter called SACAL. At all times while the ship was operated by SACAL, the master and three mates were represented by Respondent International Organization of Masters, Mates and Pilots, hereinafter called MMP, while the unlicensed seamen were represented by the Seafarers International Union, hereinafter called SIU. Each of these labor organizations had collective bargaining agreements with SACAL while SACAL operated the ship.[2]

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[1] Paragraph IV of the complaint alleges that each of the above-named unions are labor organizations within the meaning of Section 2(5) of the Act. The Respondents' answer omits any reference whatsoever to Paragraph IV and the said allegations, accordingly, have not been specifically denied. The above findings that the Respondent unions are labor organizations within the meaning of the Act have therefore been made pursuant to Section 102.20 of the Board's Rules and Regulations, Series 8, as amended.

[2] While the record is not clear whether a different employer preceded SACAL as operator of the ship, the record is clear that the above unions represented the respective units of employees ever since the Floridian commenced operations.

In November, 1970, the Floridian was decommissioned and was placed in dry dock at Norfolk, Virginia. In about March, 1971 (while the Floridian was still in dry dock) Marine & Marketing International Corporation, the charging party herein, was formed. This company was established for the principal purpose of operating the M/V "Floridian" on container service between Miami, Florida and San Juan, Puerto Rico. While the exact effective dates of a lease agreement which Marine & Marketing entered into with Containerships, Inc. is not reflected in the record, it is undisputed that Marine & Marketing succeeded SACAL as operator of the vessel. The new company took delivery of the ship at Norfolk, Virginia in mid-July, 1971.

Eduardo Garcia is the president and general manager of Marine & Marketing, hereinafter called the Company, and the record is clear that it is he who is principally responsible for running the Company and for making Company policy.[3] It is undisputed that from the outset Garcia decided to deal with MEBA with the intent of staffing the ship with officers who belonged to that labor organization, rather than to deal with MMP and hire MMP officers; it is further undisputed that this decision was motivated by Garcia's feeling that it would be economically more advantageous for the Company to deal with MEBA than with MMP.[4] It was on June 15, 1971, then, that Marine & Mar-

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[3] Garcia, a Cuban exile, was the primary organizer of the Company and a number of other Cuban exiles like himself participated as investors. Occupying the position of vice-president and general manager when the Company was first formed, Garcia became president in August, 1971.

[4] Although Garcia gave reasons why he considered it to be more economically advantageous to deal with MEBA rather than with MMP (the validity of which reasons were disputed in testimony proffered by Respondents) these reasons do not play any part in my decision and hence need no further elaboration. I recognize, of course, that Garcia's motivation in hiring MEBA personnel is related to Respondents' defense.

keting signed a three year contract with MEBA, the said contract covering a unit composed of the master, the licensed deck officers, the chief engineers and the licensed engineering officers.

MEBA, following execution of the above contract, presented Garcia with the names of several MEBA captains from whom he could make a selection for hire. After interviewing several captains, Garcia in about the latter part of June, 1971.[5] hired Captain Donald Mappin to act as master of the Floridian. Mappin reported to the ship while it was still in dry dock at Norfolk in the early part of July. Garcia authorized Mappin to hire the other ship officers and Mappin shortly engaged three MEBA mates.

On July 13, a representative of MMP, one Mr. Pesil, came aboard the Floridian in Norfolk and asked Garcia when he intended to procure officers for the ship. Garcia related the agreement he had entered into with MEBA and advised that he had already hired a captain. During the conversation which followed, Pesil told Garcia, *inter alia,* that he was making a big mistake, that MMP was now affiliated with the International Longshoremen's Association, (hereinafter called ILA), and that he would be subject to "serious consequences."[6] About 10 days later Pesil made a telephone call to Garcia and at this time again asked "when he was going to order the officers for the ship." After some discussion, Garcia finally was advised, upon his inquiry, that Captain O'Callaghan, President of MMP, was the head man of the Union. Either that day or the next Garcia went to see O'Callaghan at his New York City headquarters. Garcia explained his contractual agreement with MEBA. O'Callaghan stated that MMP had always supplied the Floridian with officers and that "by tradition

[5] All dates hereinafter, unless otherwise indicated, refer to the year 1971.

[6] The uncontroverted and credited testimony of Garcia.

those jobs belonged to us." Although nothing was accomplished during this meeting, Garcia testified without contradiction that after some argument O'Callaghan finally stated that they "were going to stop the ship."

Upon completion of repairs, the Floridian departed from Norfolk and arrived at Miami, Florida at about 6:00 p.m. on July 30. It is undisputed that Respondent MMP picketed the ship shortly after it docked at the pier. The pickets included Captain William Travers and three of his mates, all members of MMP and all of whom were the most recent officers aboard the Floridian when it had been operated by SACAL. The legend on the picket signs stated as follows:[7]

> MV Flordian Unfair to Fred W. Neuman Former 3rd Mate Member of International Org. Master Mates & Pilots Int. Marine Div. I.L.A. AFL-CIO.

The picketing was honored by ILA Longshoremen in Miami, members of an ILA local other than Respondent Local 1740.[8]

A temporary restraining order was obtained by the Company on the evening of the day when the picketing began. All parties complied with the order and the necessary work was performed. The ship sailed the next day and arrived at its destination, San Juan, on August 3.

Colon & Villalon, Inc., a shipping agent and stevedoring contractor, was under contract with the Company to unload the M/V "Floridian" at San Juan. In anticipation of the

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[7] This sign was carried by Neuman. The other signs stated the names of the respective officers who carried them, but otherwise bore the same legend.

[8] A delegate of this Florida Local told a foreman of Harrington & Company, the employer of the longshoremen, that the longshoremen would observe the picket line.

ship's arrival, Pedro Villalon, president of the stevedoring company, made arrangements with the hiring hall operated by Respondent Local 1740 to have a longshore gang report the next morning. Pursuant to this arrangement, a crew of longshoremen reported to the terminal on the morning of August 3 to await the arrival of the vessel. The Floridian arrived at the pier at about 10:00 a.m. Several of the longshoremen assisted in handling the lines as the ship was being docked, although this was not part of their longshoreman duties.

It is undisputed that at about the time the ship was being berthed, and before any unloading of the vessel had begun, a group of four MMP pickets appeared inside the terminal. These pickets included the same MMP officers who had picketed the ship in Miami and their picket signs bore substantially the same legend that was displayed in Miami. Upon the complaint of Pedro Villalon, who was present when this occurred, the police arrived and asked the pickets to leave the terminal facility. The pickets thereupon exited through a terminal gate and stationed themselves immediately outside, a public area.[9]

Villalon testified that at about this time he was called to his office, located upstairs in the terminal, to take a telephone call. Villalon testified that the speaker said he was calling from the Union hall of Respondent Local 1740 and that he wished to speak to Jorge Aponte, the vice president of the Local. According to the credited and undenied testimony of Villalon, he notified Aponte of the call and Aponte went to the upstairs office to answer it. After taking the call, Villalon observed Aponte go to the pier and speak to the crew of longshoremen who were waiting there. Villalon credibly testified that the longshore-

[9] The terminal proper is separated from the outside by a fence with two gates.

men thereupon departed from the terminal.[10] It is undisputed that they did so without having performed any unloading of the ship.

Pursuant to an injunction, the picketing of the M/V "Floridian" finally ceased on about September 17, 1971. During the approximate six week period while the picketing was in effect, Villalon on two separate occasions requested longshoremen gangs from Respondent Local 1740. Although on both occasions the Local accepted the order and dispatched the gang, these employees did not cross the picket line and no unloading of the ship was performed.[11]

B. *Conclusions as to Respondent MMP*

Section 8(b)(1)(B) of the Act provides that it shall be an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.[12]

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[10] Although Captain Robert Lowen, the leader of the pickets, testified that a number of longshoremen preceded the pickets before the pickets exited from the terminal, I credit Villalon's testimony that the longshoremen did not leave the terminal until after Aponte received the telephone call and spoke to them. This, as noted, occurred subsequent to the pickets leaving the terminal. Aponte was not called to refute the testimony of Villalon, as above related.

[11] In the early part of this six week period, the wording "We have no dispute with any other ship" was added to the legend on the picket sign.

[12] "Section 8(b)(1)(B) is, to a large degree, the correlative of the Section 7 guarantee to employees of the right 'to bargain collectively through representatives of their own choosing.' " *Meat Cutters Local 81* v. *N.L.R.B. (Safeway Stores)*, 79 LRRM 2309, fn. 10, enforcing 185 NLRB No. 130, decided January 25, 1972. (C.A.D.C.)

Initially, it is clear and I find that the captain and the three mates employed by the Company were authorized and impowered, (sic) as a part of their duties, to adjust grievances among the crew members. The latter employees are represented by the Seafarers International Union (SIU) and the Company has had a collective bargaining agreement with SIU at all times material hereto. That this contract contemplates that the captain and the mates participate in the adjustment of grievances is clearly reflected in Article II, Section 1, thereof, which provides that the representatives (delegates) of the crew "keep track of *all conditions and problems and grievances* in their respective departments, and *present to their superior officers,* on behalf of the Unlicensed Seamen in their Departments, all facts, opinions and circumstances concerning *any matter which may require adjustment or improvement.*" (Italics supplied) Indeed, the record reflects that even during the relatively short time the ship was operated by the Company, Captain Donald Mappin participated in the adjustment of grievances pertaining to such matters as claims for overtime, complaints about meals being served family style as opposed to cafeteria style, and demands for deck cots.[13] With respect to the mates, it hardly can be questioned that they also are "superior officers" and that they are vested with supervisory authority.[14] In this connection, I reject Respondents' contention that the Com-

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[13] Credited testimony of Captain Mappin. Mappin gave further testimony, which I credit, that when he first reported to the ship in Norfolk, Garcia told him that he was to handle all personnel matters with respect to hiring, firing or any disputes that would occur on the vessel.

Additionally, it may be noted that Mappin discharged a crew member for drunkeness.

[14] Mappin testified without contradiction that it is traditional for a captain to delegate certain of his supervisory authority and responsibility to the mates. He also testified that one of his mates aboard the Floridian participated in the adjustment of a claim by a crewman.

pany has no power to select the mates and that therefore the mates cannot be deemed to be Company "representatives" within the meaning of Section 8(b)(1)(B). Although of Section 1 of Article II of the MEBA contract appears to permit the Union to assign mates to employment on the Company's vessels, Section 3 of that article gives the Company the right to reject any applicant for employment whom the Company considers disqualified or unsatisfactory for the position, or to discharge any officer who in the opinion of the Company is not satisfactory. Thus, it is clear that the Company at all times retains control of the hiring and discharging of the mates.

Secondly, it is also clear, and I find, that Respondent MMP engaged in picketing against the Company and that such picketing constitutes restraint and coercion as envisioned by the statute. *International Hod Carriers, Building and Common Laborer's Union of America, Local 1140 (Gilmore Construction Company)*, 127 NLRB 541, footnote 6, enf'd. 285 F.2d 397 (C.A. 8).[14a]

Third, since it is also clear, indeed, it is conceded by Respondent, that the object of the picketing was to require the Company to replace the MEBA captain and mates with a captain and mates belonging to MMP, there can be no doubt that Section 8(b)(1)(B) is applicable to the situation at hand, *viz.*, the exercise of coercion (picketing) to require the Company to change its selection of individuals whose duties include the adjustments of employee grievances.

Respondents defend principally upon their assertion that Section 8(b)(1)(B) was not intended to apply "to a union's efforts to regain jobs lost because of a Company's desire to switch from one supervisory union to another because it could thereby effect savings in labor costs. . . ." I

[14a] See also *Laborers, Local 423 (Mansfield Flooring Co.)*, 195 NLRB No. 35.

would first note that the foregoing statement in relevant part is not factually correct. Thus, here there was no "switch" by the company (SACAL) who formerly operated the Floridian and who at that time was the employer of MMP personnel. Rather, the selection of MEBA personnel was made by Marine & Marketing, an entirely different Company and obviously also a new and different employer. In any event, and assuming that Respondent's objective to regain jobs which its members previously held aboard the same vessel was a legitimate union goal, this does not exempt it from conduct proscribed by the Act. Thus, in an analogous situation, *Meat Cutters Local 81 v. N.L.R.B., supra,* wherein the union was found to have engaged in conduct violative of Section 8(b)(1)(B) of the Act, the Union also argued, as apparently do the Respondents here, that its objective was legitimate and its conduct therefore permissible. The Court, however, stated as follows:

> The Union finally contends that since its action had the objective of preserving bargaining unit work, it was permissible under the Act. However, while it is well recognized that the preservation of unit work is a legitimate union goal, a labor organization is clearly not free to utilize any means it chooses in order to achieve a desired result.

Correlative to Respondent's contention that its conduct should be exempted from the proscription of Section 8(b)(1)(B) because of the alleged legitimacy of its objective is its further contention that it did not violate this section of the Act because the conduct "did not stem from any grievance adjusting activity on the part of the Floridian's officers." The short answer to this is that the Board has considered and rejected a similar contention in *International Brotherhood of Electrical Workers, AFL-CIO and Local 134, et al. (Illinois Bell Telephone Company),*

192 NLRB No. 17.[15] I deem myself bound by the Board's decision therein.

In sum, I find that the conduct of Respondent MMP in picketing the vessel M/V "Floridian", under all the circumstances noted above, restrained and coerced the Company in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances, and that Respondent MMP thereby violated Section 8(b)(1)(B) of the Act.[16]

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[15] While the Board majority did not elaborate on the point, it obviously did not agree with the reasoning of the dissenting Board member who in his dissent stated as follows:

> In summary, because the fines involved herein were not imposed upon the supervisors because of the manner in which they performed duties related to their collective-bargaining or grievance-adjustment functions, but were imposed because of their violation of an unrelated union rule proscribing members of the union from performing struck work during a strike, I find that the supervisors were not restrained or coerced in the performance of the statutorily protected functions. It follows that the Employer was not restrained or coerced in the selection of representatives to perform such functions.

See also *Local Union No. 2150 International Brotherhood of Electrical Workers, AFL-CIO, (Wisconsin Electric Power Company)*, 192 NLRB No. 16.

[16] Respondents also assert that legislative history reflects that Congress did not intend Section 8(b)(1)(B) to prohibit the conduct which I have herein found to be unlawful. I find no merit to this contention. Although Respondents' brief cites isolated examples of various type conduct that Congress sought to proscribe, this does not mean that it intended to exclude conduct, such as that here involved, which is literally and directly encompassed within the language of Section 8(b)(1)(B).

C. *Additional Facts; Conclusions as to Respondent Union De Trabajordores De Muelles Y Ramas Anexas, Local 1740, AFL-CIO*

A further allegation of the complaint is, in substance, that Respondent ILA Local 1740 "acted in concert" with Respondent MMP and that it also engaged in a course of conduct violative of Section 8(b)(1)(A) of the Act.

Preliminarily, it is to be noted that on March 31, 1971, officials of MMP and the International Longshoremen's Association announced that it was "the unanimous decision of the Executive Board of the International Longshoremen's Association, to issue a charter of affiliation of the International Organization of Master, Mates and Pilots, AFL-CIO, or the Marine Division of the International Longshoremen's Association."[17] Although the record was not fully developed on the point, it appears that the foregoing decision was subject to ratification by the members of both Unions. Captain Robert Lowen testified that a referendum ballot was in the process of being taken, but had not been completed, as of the time of the hearing herein.

Turning to the instant dispute, further facts are here in order. It will be recalled that the picketing of the Floridian began at the time it docked on August 3. On August 6, Garcia, the Company's president, met with various officials of the MMP and the ILA at the office of Juan Perez Roa, an International Vice-President of ILA who is located in Puerto Rico. Included among those present at this meeting were Roa, Villalon, Captain Lowen and Chu Castro, president of Local 1740.[18] The meeting proceeded with Garcia making a plea that the vessel be unloaded, pointing out that the cargo included frozen food

[17] General Counsel's Exhibit 8.

[18] It is unnecessary to name other individuals who attended this meeting.

which was subject to spoilage. Although various responses were made, it is pertinent here to note only the statements of Vice President Roa. Thus, according to the credited and unrefuted testimony of Garcia, Roa at one point stated that the International in New York was calling the shots, that he had instructions not to discharge the vessel, that the longshoremen would not discharge the ship even if the members were jailed for refusing to comply with any court injunction, and that he [Garcia] had no choice but to capitulate and do business with the Master, Mates and Pilots Union. Garcia testified that at this point Roa turned to Captain Lowen and said, "This is up to you, if you tell us to discharge the ship for Master, Mates and Pilots we will do it because now you know what is happening here." Although some further conversation took place between Garcia and the various union representatives who were present, the meeting terminated without any agreement being reached.

On August 14, Garcia went to the Carib Hilton Hotel for the purpose of meeting Captain Lowen for further negotiation of the dispute. There he met Lowen who entered the lobby accompanied by Johnny Bowers, International Executive Vice President of ILA, Willie Murphy, also an ILA Vice President, and Juan Perez Roa. Garcia addressed the group about the Company's problems and at one point complained directly to Bowers, with whom he was acquainted, concerning the position that the ILA had taken. According to the undenied testimony of Garcia, Bowers replied, "You must be crazy to think that the ILA will not support Masters, Mates & Pilots, they have affiliated with us and they have brought 12,000 members into our union."

Turning to my conclusions, it first should be recalled that on the morning of August 3, while the ship was being docked, the gang of longshoremen remained waiting on the dock of the terminal after the MMP pickets had de-

parted to the area outside the terminal upon orders of the police. At this point Jorge Aponte, vice president of Respondent Local 1740, took a phone call from his union hall, upon completion of which he went and spoke to the longshoremen who had remained at the dock. As previously found, these employees departed as soon as he spoke to them. Upon consideration of all the circumstances, including Respondents' failure to call Aponte to give any explanation for this conduct, I think it a reasonable inference, and I so infer, that Aponte gave instructions to the longshoremen to leave.[19] However, assuming that standing alone this incident is insufficient to bind Respondent Local 1740, the statements which Juan Perez Roa made to Garcia on August 6 that he had instructions from New York not to discharge the vessel, that the longshoremen would not unload the ship, as well as the other remarks by him at this time as set forth above, impel the obvious conclusion, and I find, that strike instructions were outstanding to members of the Local not to unload the vessel. Although the statements were made by a representative of the International Union, President Chu Castro of Respondent Local 1740 was present at the time and took no action to disavow what he said.

In addition to the foregoing, it will be recalled that the legend on the picket signs included the words "International Org. Master, Mates & Pilots Int. Marine Div. *I.L.A.* AFL-CIO" (emphasis supplied). This legend remained on the signs throughout the picketing, yet the ILA took no steps to disassociate itself from the picketing nor did it ever disclaim affiliation with Respondent MMP, as stated on the picket sign.

In view of all the foregoing, I conclude and find that Respondent Local 1740 acted in concert with Respondent MMP and that its entire course of conduct, as above de-

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[19] Cf. *International Brotherhood of Teamsters, Local No. 554 (Clark Bros. Transfer Company, et al.)*, 116 NLRB 1891, 1901.

scribed, was in violation of Section 8(b)(1)(B) of the Act. [20]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents set forth in section III above, appearing in connection with the operations of Respondents set forth in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and conclusions of law, and upon the entire record in this case, I hereby make the following:

CONCLUSIONS OF LAW

1. The Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Organization of Masters, Mates & Pilots, International Marine Divsion, AFL-CIO and Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, AFL-CIO, are labor organizations within the meaning of Section 2(6) and (7) of the Act.

3. By picketing the ship M/V "Floridian" for the purpose of restraining and coercing an employer in the selec-

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[20] Although on two occasions after August 3 Respondent Local 1740 went through the motions of sending longshoremen to the terminal (at Villalon's request) this does not dissuade me that this Respondent did not engage in the unlawful course of conduct herein found.

tion of his representatives for the purposes of collective bargaining or the adjustment of grievances, Respondent International Organization of Masters, Mates and Pilots, International Marine Division, AFL-CIO, have engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

4. By instructing their members not to unload the vessel M/V "Floridian" for the purpose of restraining or coercing an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances, Respondent Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, AFL-CIO, has engaged in the unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

A. Respondent International Organization of Masters, Mates and Pilots, International Marine Divsion, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Picketing the vessel M/V "Floridian" to procure the removal of Marine & Marketing International Corpora-

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[21] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

tion of its representatives for the purposes of collective bargaining or the adjustment of grievances.

(b) In any other manner restraining or coercing that employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places at its offices and meeting halls, and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix A."[22] Copies of the notice on forms to be provided by the Regional Director for Region 24, shall after being duly signed by an authorized representative be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for Region 24, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.[23]

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[22] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[23] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

B. Respondent Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Ordering, instructing or advising its members to withhold their services in the unloading of the M/V "Floridian" for the purpose of procuring the removal by Marine & Marketing International Corporation of its representatives for the purposes of collective bargaining or the adjustment of grievances.

(b) In any other manner restraining or coercing that employer in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its offices and meeting halls copies of the notice attached hereto and marked "Appendix B."[24] Copies of said notice on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative, shall be posted by Respondent immediately by receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places were notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that certain notices are not altered, defaced or covered by any other material.

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[24] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[25]

Dated at Washington, D.C.

[February 22, 1972]

JOHN P. VON ROHR
John P. von Rohr
Trial Examiner

APPENDIX A

(Notice re "International" etc.)

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT picket the ship M/V "Floridian" to procure the removal by MARINE & MARKETING INTERNATIONAL CORPORATION of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL NOT in any other manner restrain or coerce the above-named employer in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, AFL-CIO
(Labor Organization)

Dated .....By .....
(Representative) (Title)

---

[25] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office Pan Am Building, 7th Floor, P.O. Box U U, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00919 (Tel. No. 106-764-2424).

APPENDIX B

(Notice re "Union De Trabajadores" etc.)

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT order, instruct or advise our members to withhold their services in the unloading of M/V "Floridian" for the purpose of procuring removal by MARINE & MARKETING INTERNATIONAL CORPORATION of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL NOT in any other manner restrain or coerce the above-named employer in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

UNION DE TRABAJADORES DE MUELLES Y RAMAS ANEXES, LOCAL 1740, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office Pan Am Building, 7th Floor, P.O. Box U U, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00919 (Tel. No. 106-764-2424).

Trial Examiner's Errata

TXD-100-72

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

[SAME TITLE]

The Trial Examiner's Decision in the above-captioned case is hereby corrected as follows:

At page 3, line 34, after the words "to deal with" add the words "Marine Engineers Beneficial Association, District 2, a labor organization, herein called".

JOHN P. VON ROHR
John P. von Rohr
Trial Examiner

Dated: February 22, 1972
Washington, D. C.

Trial Examiner's Addenda

TXD-100-72
San Juan, P. R.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

[SAME TITLE]

The Trial Examiner's Decision in the above-captioned case is hereby amended as follows:

(1) At page 13, line 12, the following sentence is to be added: "The said Appendix A shall be posted in Spanish as well as in English."

(2) At page 14, line 2, the following sentence is to be added: "The said Appendix B shall be posted in Spanish as well as in English."

JOHN P. VON ROHR
John P. von Rohr
Trial Examiner

Dated: March 2, 1972
Washington, D. C.

APPENDIX E

Decision and Order

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

[SAME TITLE]

On February 22, 1972, Trial Examiner John P. von Rohr issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief and a request for oral argument,[1] and the General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

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[1] Respondent's request for oral argument is hereby denied as, in our opinion, the record in this case, including the exceptions and briefs, adequately presents the issues and positions of the parties.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondents, International Organization of Masters, Mates and Pilots International Marine Division, ILA-AFL-CIO; and Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, ILA-AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C.
Jun 12 1972

Edward B. Miller, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

LIBRARY
SUPREME COURT, U. S.

No. 73-1238

FILED
APR 1 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO, *et al.*, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1238

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO, *et al.*, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 486 F. 2d 1271 (Pet. App. 3a-17a). The decision and order of the National Labor Relations Board are reported at 197 NLRB No. 69 (Pet. App. 18a-42a).

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1973 (Pet. App. 1a-2a). A petition for rehearing was denied on December 3, 1973 (Pet. App. 2a). The petition for a writ of certiorari was filed on February 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the union restrained and coerced the employer in the selection of its representatives for the purposes of the adjustment of grievances by picketing its ship in order to force it to replace four officers who had grievance adjustment functions with others who were members of the union.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 3.

STATEMENT

A. The Board's Findings of Fact

Until November 1970, when it became bankrupt, South American Caribbean Line ("Caribbean Line") operated the M/V *Floridian*, a container vessel, between Miami, Florida, and San Juan, Puerto Rico (Pet. App. 20a-21a; A. 97-98, 108, 193-194, 202,

211).[1] During the years of Caribbean Line operation, the ship's master and three mates were represented by the petitioner, International Organization of Masters, Mates and Pilots ("Masters, Mates, and Pilots"),[2] the engineering officers by Marine Engineers Beneficial Association, District 2 ("Marine Engineers"), and the unlicensed seamen by Seafarers International Union ("Seafarers International") (Pet. App. 20a; A. 98, 175, 193). When Caribbean Line became bankrupt, the *Floridian* was decommissioned and laid up as part of the reserve merchant fleet in Norfolk, Virginia (Pet. App. 21a; A. 68, 193-194, 202, 211).

In the spring of 1971,[3] while the vessel was still in the reserve merchant fleet, a new company, Marine & Marketing International Corporation (the "employer"), was formed for the purpose of resuming shipping operations between Miami and San Juan (Pet. App. 21a; A. 57, 210). On June 15, Eduardo Garcia, the employer's president, signed a three-year agreement with the Marine Engineers Union covering a unit of the master and mates as well as the engineering officers (Pet. App. 21a-22a; A. 89-90, 102, 205-208). Seafarers International continued to represent the unlicensed seamen (Pet. App. 26a; A. 125, 132-133, 142, 216). Garcia's chief reason for

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[1] "A." references are to the joint appendix in the court below.

[2] Masters, Mates, and Pilots is conceded by petitioners to be a labor organization within the meaning of the Act (Pet. App. 11, n. 2).

[3] All dates hereafter are in 1971 unless otherwise indicated.

staffing the ship with Marine Engineers Union deck officers, rather than with officers from the Masters, Mates and Pilots Union, was economic (Pet. App. 21a). Marine Engineers and Seafarers International agreed to a crew which was smaller by one engineer and three seamen than that which had been specified by the Masters, Mates, and Pilots Union in its contract with Caribbean Line; this difference saved the employer approximately $100,000 per year (A. 102, 111-112).

Pursuant to the June 15 agreement, Captain Donald Mappin, a Marine Engineers member, was hired as master and authorized to engage, as subordinate officers, mates who had Caribbean containership service; he hired three qualified Marine Engineers members as mates (Pet. App. 22a; A. 94-95). The master and the mates were all hired as supervisors, and all had responsibility for adjusting the grievances of crew members (Pet. App. 26a; A. 93-94, 126, 129-130).[4]

On July 13, Pesil, a Masters, Mates and Pilots representative, boarded the *Floridian*, which was still dry-docked for repairs in Norfolk, and asked Garcia, in Captain Mappin's presence, when he was "going to order the officers for the vessel" (Pet. App. 22a; A. 68-69). Garcia replied that he "had a captain already, that [additional] officers would follow shortly, and that [he] was not ordering any other of-

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[4] Petitioners concede that "[t]he *Floridian's* master and mates 'adjust grievances among crew members' * * *" (Pet. 9).

ficers" (*ibid.*). Pesil pointed out that Masters, Mates, and Pilots had staffed the ship since her commissioning and was a very competent organization. When Garcia rejoined that he already had a contract with another union to supply the officers, Pesil added that the employer was "making a big mistake" and that, since Masters, Mates and Pilots was now affiliated with "ILA" (International Longshoremen's Association), "there [could] be some serious consequences" (Pet. App. 22a; A. 69, 132).[5]

Ten days later, Pesil called Garcia and again asked when he was going to "order the officers" (Pet. App. 22a; A. 69-70). Garcia asked to see "your head man," and Pesil referred him to Captain Thomas O'Callaghan, president of Masters, Mates and Pilots, whose office is in New York City (*ibid.*). A few days later, Garcia met with O'Callaghan, who stated that his union had "owned" the ship since her commissioning, *i.e.*, had furnished all her deck officers "by tradition" (Pet. App. 22a-23a; A. 70). Garcia, citing his contract with the Marine Engineers, said that he could "not possibly change." O'Callaghan replied that he would rather see the *Floridian* "laid up" than staffed by the Marine Engineers, and warned that his union was "going to stop the ship" (Pet. App. 23a; A. 71).

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[5] Pesil also interviewed Mappin, demanded to know his union affilation and that of his fellow officers, and declared that the officers "should come from" the Masters, Mates and Pilots Union (A. 132).

The *Floridian* sailed from Norfolk on July 31, in the charge of Mappin and his Marine Engineers subordinate officers. Upon arriving at Miami to embark her cargo, the ship was met at her assigned pier by four Masters, Mates, and Pilots pickets: Captain Bill Travers, who formerly had served as her master, Max Moore and Fred Neuman, former mates, and a fourth individual not identified in the record (Pet. App. 23a; A. 71-73). Neuman was patrolling with a sign reading as follows:

> MV FLORIDIAN UNFAIR TO FRED W. NEUMAN FORMER 3RD MATE MEMBER OF INTERNATIONAL ORG. MASTER MATES & PILOTS, INT. MARINE DIV., I.L.A. AFL-CIO

Other picketing officers carried similar signs (Pet. App. 23a; A. 72-73).

Longshoremen of a Miami ILA local observed the picket line and refused to load the ship. The employer obtained a temporary restraining order from the state court, whereupon the pickets were removed and the ship was loaded by the longshoremen. She sailed the next day for San Juan, arriving on August 3 (Pet. App. 23a; A. 75-77).

The *Floridian* was to be unloaded in San Juan by a stevedoring gang dispatched from the hiring hall of the Union de Trabajadores de Muelles y Ramas Anexas, Local 1740, ILA, AFL-CIO ("Local 1740"), under arrangements made by Colon and Villalon, Inc., the employer's shipping agent and stevedoring contractor (Pet. App. 23a-24a; A. 147). The gang had checked in with the paymaster at the dock and

was prepared to go to work when the same officers who had picketed at Miami appeared alongside the ship with signs in Spanish similar to those carried in Miami (Pet. App. 24a; A. 77-78, 148). The president of Colon and Villalon, Pedro Villalon, complained to Captain Robert J. Lowen, International Secretary-Treasurer of Masters, Mates and Pilots, who appeared to be the leader of the pickets, that they were trespassing on private property. Receiving no adequate response from Lowen, Villalon called the police; the pickets moved through the terminal gateway onto public property and resumed picketing (Pet. App. 24a; A. 149-150).

Villalon was then called to a dockside telephone. The speaker stated that he was calling from the hiring hall of Local 1740 and wished to talk with Jorge Aponte, vice president of the local, who was present at the terminal that morning. Villalon called Aponte to the phone, and thereafter Aponte went to the pier and talked with the longshoremen. The gang left the terminal without unloading any of the *Floridian's* cargo (Pet. App. 24a-25a; A. 151-152, 157-158). Twice thereafter Local 1740 gangs were dispatched at Villalon's request, but refused to cross the picket line.[6] As a consequence, the *Floridian* remained berthed for six weeks until the picketing ceased pursuant to a district court injunction issued under

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[6] Upon a fourth request, the gangs failed to show up at all (A. 153).

Section 10(j) of the Act, 29 U.S.C. 160(j) (Pet. App. 25a; A. 153, 164.)[7]

B. The Decisions Below

The Board, in agreement with the Trial Examiner, found that Masters, Mates and Pilots had violated Section 8(b)(1)(B) of the Act by picketing the *Floridian* with the object of requiring the employer "to replace the [Marine Engineers] captain and mates with a captain and mates belonging to [Masters, Mates and Pilots]," thereby coercing the employer "to change its selection of individuals whose duties include the adjustments of employee grievances" (Pet. App. 27a, 41a-42a). The Board further found that Local 1740 had "acted in concert with * * * [Masters, Mates and Pilots]" and that thus Local 1740, too, had violated Section 8(b)(1)(B) (Pet. App. 32a-33a).[8] The Board ordered both Masters, Mates, and Pilots and ILA Local 1740 to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 34a-37a).

A divided court of appeals affirmed the Board's findings and conclusions, and enforced its order (Pet. App. 3a-17a). Observing that Masters, Mates, and Pilots' actions "come within the literal purview of

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[7] *Compton* v. *International Organization of Masters, Mates and Pilots, International Marine Division, ILA-AFL-CIO, et al.*, Civil No. 712-71, 78 LRRM 2598 (D. P.R.).

[8] The petition does not contest the propriety of the Board's subsidiary finding that Local 1740 instructed its longshoremen to observe the San Juan picket line (Pet. 13, n. 3).

the * * * language" of Section 8(b)(1)(B), the Court explained:

> The admitted purpose of the picketing was to pressure the company to break its contract with [Marine Engineers], fire the new [Marine Engineers] master and mates, and rehire the former [Masters, Mates and Pilots] master and mates. The Board was obviously correct in concluding that the master and mates are representatives of the employer for the adjustment of grievances. Therefore, under the statutory language the picketing was intended to coerce the employer in the selection of his grievance adjusting representatives. [Pet. App. 6a.]

The court rejected the contention that the picketing fell outside the purview of Section 8(b)(1)(B) because it was carried out by supervisors trying to regain their lost jobs and that Section 14(a) of the Act (Pet. 3) shows that Congress intended to permit supervisors to resort to self-help to protect their interests (Pet. App. 6a-8a). The court also rejected the contention that Section 8(b)(1)(B) was not intended to reach a situation in which the alleged coercion is unrelated to the performance of grievance adjustment or collective bargaining functions by the representatives in question (Pet. App. 8a-11a).

ARGUMENT

The court of appeals correctly applied Section 8(b)(1)(B) of the Act to the unique facts of this particular case. There is thus no occasion for further review.

1. As the court below held, Masters, Mates and Pilots' actions "come within the literal purview of the * * * language" of Section 8(b)(1)(B) (Pet. App. 6a). That Section makes it an unfair labor practice for a union to restrain or coerce an employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The picketing was admittedly aimed at forcing the employer to dismiss four supervisors with grievance adjustment responsibilities and to hire others in their place.[9] Had the union succeeded in its efforts, the employer would have been restrained from continuing to employ the representatives it had selected for those purposes and coerced into hiring others it did not wish to select.[10]

Moreover, upon finding such direct coercion for replacement of Section 8(b)(1)(B) representatives, the court below properly declined to scrutinize the employer's motives for wishing to keep the represen-

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[9] It is beyond question that the means selected—picketing aimed at shutting down the ship's operations—were coercive. "A threat directed to an employer to shut down a job unless the employer complies with a union demand to remove a supervisor and its 'representative' from the job is the most obvious kind of statutory coercion." *Local 423, Laborers, International Union of North America, AFL-CIO (Mansfield Flooring Co.)*, 195 NLRB 241, enforced, 82 LRRM 2478 (C.A.D.C.). See also *International Hod Carriers, Local 1140 (Gilmore Construction Co.)*, 127 NLRB 541, 545, n. 6, enforced, 285 F. 2d 397 (C.A. 8).

[10] Cf. *International Typographical Union Local 38* v. *National Labor Relations Board*, 278 F. 2d 6, 11-13 (C.A. 1), affirmed by an equally divided Court, 365 U.S. 705, 707; *Portland Stereotypers' and Electrotypers' Union No. 48 (Journal Publishing Co.)*, 137 NLRB 782, 787.

tatives he had chosen or the reasons actuating the union's objection to the employer's representatives. For, even if "[g]rievance adjustment was not a factor which entered into the employer's action or [Masters, Mates and Pilots'] reaction" (Pet. 18), to eliminate the picketing would have required the employer to change his representatives for adjusting grievances no less than if the picketing had been directed at the manner in which the Marine Engineers master and mates had performed that function. The legislative history petitioners cite (Pet. 27-28) does not establish that Congress intended to confine Section 8(b)(1)(B) to a situation where the union "dislikes the way in which [a supervisor] may represent the employer in collective bargaining or grievance adjustment" (Pet. 28).[11]

2. To interpret Section 8(b)(1)(B) of the Act as proscribing the picketing here does not "break faith with the scheme that Congress fashioned in 1947 in treating with supervisors"—*i.e.*, withdrawing "statutory protection from them," but not "divest[ing] them of self-protection" (Pet. 33). While Congress

[11] On the contrary, the remarks of Senator Ellender petitioners quote (Pet. 28) indicate that Section 8(b)(1)(B) was intended to curb the practice whereby unions "have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union" (Pet. 28). A "personnel director or foreman, or other supervisory official" *(ibid.)* could be "too strict" not only when he was performing his collective bargaining or grievance adjustment functions, but also when he was performing his other supervisory or management functions.

may have intended to allow supervisors to resort to self-help to protect their interests, there is no indication that it intended to free them of the restrictions of Section 8(b) when they sought to do so through a labor organization which consists of statutory employees as well as supervisors (a "statutory labor organization").[12] A statutory labor organization, unlike one composed solely of supervisors, enjoys the protection of the Act[13] and it is also subject to its proscriptions.[14] In the present case, the supervisors

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[12] As the court below noted (Pet. App. 6a-7a):

> Section 8(b), by its terms, applies only to "a labor organization or its agents * * *." A union composed solely of supervisors is not a "labor organization" as that term is defined in the Act. See 29 U.S.C. 152(5) (1970). It has no statutory "employees." See 29 U.S.C. 152(3). Such a union, therefore, cannot commit an unfair labor practice under any of the subsections of Section 8(b), including Section 8(b)(1)(B).

[13] For example, the protection afforded by Section 8(a)(2), 29 U.S.C. 158(a)(2), and Section 8(a)(3), 29 U.S.C. 158(a)(3) (see Pet. App. 8a).

[14] To subject supervisors to the proscriptions of the Act when they join a labor organization which includes statutory employees, but not when they join one composed exclusively of supervisors, is not, as petitioners contend (Pet. 35-37), inconsistent with Congress' rejection of the proposal to accord statutory protection to supervisors so long as they confined their concerted activity to unions restricted to themselves. Congress rejected that proposal because it concluded that the risk of divided loyalty was as great when supervisors joined a union composed exclusively of supervisors as when they joined a union which also represented rank-and-file employees (Pet. 36); therefore, the employer could insist that his supervisors not join even a union composed solely of supervisors. Congress was not addressing itself to the issue here—*i.e.*, whether, assuming the employer were willing to

chose not only to belong to a statutory labor organization,[15] but to exploit the affiliation of their union with another statutory labor organization, the ILA, with the result that the *Floridian's* loading and unloading operations were shut down for a considerable period (*supra*, pp. 7-8).[16]

3. Contrary to petitioners' contention (Pet. 16-19), the issue here is not closely related to that presented in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, and *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, Nos. 73-795 and 73-556, certiorari granted, January 21, 1974.[17] The question in the

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permit its supervisors to join a rank-and-file union, that union would be subject to the restrictions of Section 8(b) when acting on behalf of the supervisors.

[15] Petitioners concede that Masters, Mates and Pilots is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. 152(5) (Pet. 11, n. 2).

[16] *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Ass'n*, 382 U.S. 181, is not to the contrary. Although the Court there held that state court jurisdiction to enjoin the picketing was not arguably prohibited by Section 8(b), the Court had no occasion to focus on the applicability of Section 8(b)(1)(B). For, as the court below noted (Pet. 10a, n. 3), in "*Hanna* the picketing was not directed at having certain engineers fired and replaced, as was the case here, but rather at having [Marine Engineers] recognized as the bargaining representative of then employed engineers, a majority of whom allegedly desired [Marine Engineers] as their representative."

[17] Significantly, Judges Wright and MacKinnon, who, respectively, wrote the majority and dissenting opinions in those cases, formed the majority in the present case.

latter cases is whether Section 8(b)(1)(B) of the Act proscribes union discipline of supervisor-members for performing rank-and-file work during an economic strike. The resolution of that question depends on (1) whether Section 8(b)(1)(B) reaches not only direct union pressure on the employer to change the identity of the representative he has selected for grievance adjustment or collective bargaining purposes, but also indirect pressure which is likely to affect the loyalty of that representative in the performance of his supervisory or management functions; and on (2) whether the performance by a supervisor of rank-and-file work during a strike is a supervisory or management function. In the present case, the union's pressure was direct, and there is no question that, if successful, it would have required the employer to change the identity of representatives he had selected for grievance adjustment purposes.[18]

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[18] Although the Trial Examiner in the present case cited the Board's decision in *Electrical Workers, supra* (Pet. App. 28a-29a), it was only in answer to the contention that Section 8(b)(1)(B) did not reach Masters, Mates and Pilots' conduct because it " 'did not stem from any grievance adjusting activity on the part of the *Floridian's* officers.' "

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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